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In The
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1256

MAXWELL DARKS,
Petitioner,

VERSUS

TRANSOK PIPE LINE COMPANY,
an Oklahoma Corporation, and
THOMAS S. KLEPPE, Secretary of Interior,
The United States Department of Interior,
Respondents.

AND

MAXWELL DARKS and LES STARKS, d/b/a
Greasy Creek Cattle Company,
Petitioners,

VERSUS

TRANSOK PIPE LINE COMPANY,
an Oklahoma Corporation,
Respondent.

TRANSOK PIPE LINE COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

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ORDERS AND PLEADINGS BELOW

(1) Application to Assume Original Jurisdiction filed in the Supreme Court of the State of Oklahoma on July 18, 1975, in case styled Transok Pipe Line Company v. Frank Seay, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes,

State of Oklahoma, Supreme Court No. 48708, (App.A, pp. 1a-2a).

(2) Application to Assume Original Jurisdiction filed in the Supreme Court of the State of Oklahoma on July 18, 1975, in case styled Transok Pipe Line Company v. Frank Seay, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Supreme Court No. 48709, (App.A, pp. 3a-4a).

(3) Petition for Writ of Prohibition filed in the Supreme Court of the State of Oklahoma on July 18, 1975, in case styled Transok Pipe Line Company v. Frank Seay, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Supreme Court No. 48708, (App.A, pp. 5a-11a).

(4) Petition for Writ of Prohibition filed in the Supreme Court of the State of Oklahoma on July 18, 1975, in case styled Transok Pipe Line Company v. Frank Seay, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Supreme Court No. 48709, (App.A, pp. 12a-18a).

(5) Brief in Support of Petition for Writ of Prohibition filed in the Supreme Court of the State of Oklahoma on July 18, 1975, in case styled Transok Pipe Line Company v. Frank Seay, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Supreme Court No. 48708, (App.A, pp. 19a-30a).

(6) Brief in Support of Petition for Writ of Prohibition filed in the Supreme Court of the State of Oklahoma on July 18, 1975, in case styled Transok Pipe Line Company v. Frank Seay, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Supreme Court No. 48709, (App.A, pp. 31a-42a).

(7) Notice filed in the Supreme Court of the State of Oklahoma on July 18, 1975, in case styled Transok Pipe Line Company v. Frank Seay, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Supreme Court No. 48708, (App.A, p. 43a-44a).

(8) Notice filed in the Supreme Court of the State of Oklahoma on July 18, 1975, in case styled Transok Pipe Line Company v. Frank Seay, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Supreme Court No. 48709, (App.A, p. 45a-46a).

(9) Affidavit of Service filed in the Supreme Court of the State of Oklahoma on July 18, 1975, in case styled Transok Pipe Line Company v. Frank Seay, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Supreme Court No. 48708, (App.A, p. 47a-48a).

(10) Affidavit of Service filed in the Supreme Court

of the State of Oklahoma on July 18, 1975, in case styled Transok Pipe Line Company v. Frank Seay, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Supreme Court No. 48709, (App.A, p. 49a-50a).

(11) Order of the Supreme Court of the State of Oklahoma of July 21, 1975, granting a stay against the Honorable Frank Seay, District Judge of Hughes County, Oklahoma, in the cases styled Transok Pipe Line Company v. Frank Seay, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Supreme Court Nos. 48708 and 48709, (App.A, p. 51a).

(12) Motion to Deny Application to Assume Original Jurisdiction and Motion to Dismiss Petition for Writ of Prohibition filed in the Supreme Court of the State of Oklahoma on July 29, 1975, in case styled Transok Pipe Line Company v. Frank Seay, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Supreme Court No. 48708, (App.A, pp. 52a-54a).

(13) Motion to Deny Application to Assume Original Jurisdiction and Motion to Dismiss Petition for Writ of Prohibition filed in the Supreme Court of the State of Oklahoma on July 29, 1975, in case styled Transok Pipe Line Company v. Frank Seay, the Honorable Judge

of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Supreme Court No. 48709, (App.A, pp. 55a-57a).

(14) Brief in Support of Motion to Deny Application to Assume Original Jurisdiction and Motion to Dismiss Petition for Writ of Prohibition filed in the Supreme Court of the State of Oklahoma on July 29, 1975, in case styled Transok Pipe Line Company v. Frank Seay, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Supreme Court No. 48708, (App.A, pp. 58a-63a).

(15) Brief in Support of Motion to Deny Application to Assume Original Jurisdiction and Motion to Dismiss Petition for Writ of Prohibition filed in the Supreme Court of Oklahoma on July 29, 1975, in case styled Transok Pipe Line Company v. Frank Seay, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Supreme Court No. 48709, (App.A, pp. 64a-67a).

(16) Memorandum Brief filed in the Supreme Court of the State of Oklahoma on August 8, 1975, in case styled Transok Pipe Line Company v. Frank Seay, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Supreme Court No. 48708, (App.A, pp. 68a-72a).

(17) Memorandum Brief filed in the Supreme Court

of the State of Oklahoma on August 8, 1975, in the case styled Transok Pipe Line Company v. Frank Seay, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Supreme Court No. 48709, (App.A, pp. 73a-77a).

(18) Reply to Memorandum Brief filed in the Supreme Court of the State of Oklahoma on August 11, 1975, in case styled Transok Pipe Line Company v. Frank Seay, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Supreme Court No. 48708, (App.A, pp. 78a-80a).

(19) Reply to Memorandum Brief, filed in the Supreme Court of the State of Oklahoma on August 11, 1975, in case styled Transok Pipe Line Company v. Frank Seay, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Supreme Court No. 48709, (App.A, pp. 81a-83a).

(20) Order of the Supreme Court of the State of Oklahoma of September 8, 1975, granting Writs of Prohibition in cases styled Transok Pipe Line Company v. Frank Seay, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Supreme Court Nos. 48708 and 48709, (App.A, pp. 84a-85a).

(21) Petition for Rehearing filed in the Supreme

Court of the State of Oklahoma on September 16, 1975, in cases styled Transok Pipe Line Company v. Frank Seay, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Supreme Court Nos. 48708 and 48709, (App.A, pp. 86a-89a).

(22) Order to File Response of the Supreme Court of the State of Oklahoma of October 23, 1975, ordering Transok Pipe Line Company to file a Response to the Petition for Rehearing in cases styled Transok Pipe Line Company v. Frank Seay, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Supreme Court Nos. 48708 and 48709, (App.A, p. 90a).

(23) Petitioner's Response to Petition for Rehearing filed in the Supreme Court of the State of Oklahoma on November 4, 1975, in cases styled Transok Pipe Line Company v. Frank Seay, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Supreme Court Nos. 48708 and 48709, (App.A, pp. 91a-98a).

(24) Order of the Supreme Court of the State of Oklahoma of December 9, 1975, denying oral argument and rehearing in cases styled Transok Pipe Line Company v. Frank Seay, Judge, Supreme Court Nos. 48708 and 48709, (App.A, p. 116a).

COUNTER-JURISDICTIONAL STATEMENT

Respondent admits that the final order of the Supreme Court of Oklahoma was entered on September 8, 1975, that a timely motion for rehearing was denied on December 9, 1975, and that this Petition for certiorari was filed within 90 days of that date, pursuant to 28 U.S.C. § 2101. Respondent denies that this Court's jurisdiction is invoked under 28 U.S.C. § 1257 (3) for the reasons stated in its Argument, *infra*, pages 12-31.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THESE CASES

(1) U.S. CONST. amend. V, (App.B, p. 117a).
(2) U.S. CONST. amend. XIV, (App.B, p. 117a).
(3) OKLA. CONST. art. 2 §24, (App.B, p. 117a).
(4) 28 U.S.C. §1257(3), (App.B, p. 118a).
(5) 28 U.S.C. §2101, (App.B, p. 119a).
(6) 52 O.S. 1971 §36.4, (App.B, p. 120a).
(7) 66 O.S. 1973 §53, (App.B, p. 121a).
(8) 66 O.S. 1971 §54, (App.B, p. 122a).
(9) 66 O.S. 1971 §55, (App.B, p. 123a).
(10) 66 O.S. 1971 §57, (App.B, p. 124a).
(11) U.S. Supreme Court Rule 19(1)(a), (App.B, p. 125a).

RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW BY PETITIONER

(A) Whether a party with the power of eminent domain can trespass if the condemnor's entry onto the land-

owners's property occurred prior to the time permitted for entry onto the land in a condemnation action.

(B) Whether the landowner can halt the alleged trespass (the taking) by a temporary restraining order or injunction.

(C) Whether a party with the power of eminent domain is required to pay damages resulting from the alleged trespass (the taking).

(D) Whether the landowner has an adequate remedy for the alleged trespass (the taking).

COUNTER-STATEMENT OF THE CASE

In 1972, Respondent sought an order of the Oklahoma Corporation Commission, in Cause No. 35868, authorizing the use of the substantially depleted Channel Booch formation underlying Hughes County, State of Oklahoma, for the purpose of the underground storage of natural gas, as required by law. On March 5, 1973, the Corporation Commission of the State of Oklahoma granted Respondent's Application and entered Order No. 96291 holding that the Channel Booch formation was suitable for the underground storage of natural gas, and that Respondent was authorized and empowered to use said formation for the underground storage of natural gas. Said Order No. 96291 included a provision indicating that it was the certificate required by 52 O.S. 1971, §36.4, which is a condition precedent to the filing

of a petition for condemnation in the courts of the State of Oklahoma. Thereafter, the Petitioner herein sought to review Order No. 96291 in the Oklahoma Supreme Court, but the Supreme Court of Oklahoma held in *Transok Pipe Line Co. v. Darks*, 515 P.2d 218 (Okl. 1973), that it was without jurisdiction to review the Commission Order No. 96291, as the Petitioner herein had failed to timely file his appeal.

Pursuant to Commission Order No. 96291, Respondent filed a series of condemnation actions, some of which involved the Petitioner herein, including the Hughes County actions Nos. C-73-93, C-73-94, C-73-95, and an action in the United States District Court for the Eastern District of Oklahoma, No. 73-186-C. Said Hughes County actions are presently on appeal to the Oklahoma Supreme Court as Causes No. 48054, 48055, and 48056, and the Eastern District action is currently pending on that Court's jury trial docket. On November 26, 1974, Petitioners filed in the District Court of Hughes County, State of Oklahoma, two trespass actions, numbered C-74-250 and C-74-251. On January 24, 1975, Respondent filed its demurrer to the petitions sounding in trespass on the grounds that said petitions did not state a cause of action against the Respondent herein, because Petitioners' exclusive remedy lay in condemnation or inverse condemnation. On the 28th day of February,

1975, Petitioners filed their Amended Petitions; however, the defects raised by the Demurrer of Respondent herein were not cured by said Amended Petitions. On the 19th day of June, 1975, Respondent's Demurrer was argued before the Honorable Frank Seay, Judge of the District Court of Hughes County, State of Oklahoma. By order of Judge Seay, on June 19, 1975, Respondent's Demurrer was overruled.

On July 18, 1975, Respondent filed its writ of prohibition actions, Causes No. 48708 and 48709, with the Supreme Court of the State of Oklahoma. (App.A, pp. 1a-50a). On that date, Respondent filed its Brief in Support of Petition for Writ of Prohibition (App.A, pp. 19a-42a), arguing that a landowner's exclusive remedy for obtaining just compensation for all damages sustained (including damages sustained through negligence) incident to a condemnor's entry and taking in condemnation, lay in the statutory remedy of condemnation or inverse condemnation, and that the common law action of trespass would not lie against a party lawfully exercising the power of eminent domain. On the basis of this argument, Respondent maintained that the trial judge had been in error in overruling Respondent's Demurrer and prayed for a writ of prohibition. On July 29, 1975, Petitioners herein filed their Motion to Deny Application to Assume Original Jurisdiction, Motion to Dismiss

Petition for Writ of Prohibition, and Brief in Support thereof. (App.A, pp. 52a-67a).

On September 8, 1975, the Supreme Court of the State of Oklahoma entered its Order in Causes 48708 and 47809 granting the writs of prohibition prayed for by the Respondent herein. (App.A, pp. 84a-85a). On September 16, 1975, the Petitioners herein filed their Petition for Rehearing with the Oklahoma Supreme Court. (App.A, pp. 86a-89a).

On October 23, 1975, the Oklahoma Supreme Court entered its Order to File Response directed to the Respondent herein (App.A, p. 90a), and Respondent filed its Response to Petition for Rehearing on November 4, 1975. (App.A, pp. 91a-98a). On December 9, 1975, the Oklahoma Supreme Court entered its final order in Causes 48708 and 48709: "Oral Argument and Rehearing Denied." (App.A, p. 116a).

ARGUMENT

I. THIS COURT LACKS JURISDICTION AS NO FEDERAL QUESTION WAS PROPERLY PRESENTED TO THE STATE COURT OR DECIDED BY THE STATE COURT.

Petitioner seeks a review of the order entered by the Oklahoma Supreme Court in Causes 48708 and 48709. At page 6 of the Petition for Writ of Certiorari, it is stated:

> The final order of the Supreme Court of Oklahoma was entered on September 8, 1975. A timely motion for rehearing was denied on December 9, 1975, and this petition for certiorari was filed within 90 days of that date. *This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).* (Emphasis added.)

28 U.S.C. §1257(3) provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court as follows: By writ of certiorari, where the validity of a treaty or statute of the United States, is drawn in question, or *where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution*, treaties, or laws *of the United States*, or where any title, right, privilege or immunity is specifically set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. (Emphasis added.)

Petitioner argues that this Court has jurisdiction to review Causes 48708 and 48709 since Petitioner drew into question the validity of an Oklahoma statute on the grounds of its being repugnant to the Fifth and Fourteenth Amendments to the United States Constitution.

Did Petitioner *draw into question* the validity of an Oklahoma statute on the grounds of its being repugnant to the Constitution? At page 18-19 of the Petition for Writ of Certiorari, it is stated:

> Petitioners *did not* specifically *raise the* issue of *violation of Amendments V and XIV* in the plead-

> ings in Cases No. 48708 (S.Ct.) and 48709 (S.Ct.). It was raised in the *oral argument, not transcribed*, on August 5, 1975 . . . .° ° ° It did not appear that violation of Amendments V and XIV was an issue in the cases. (Emphasis added.)

The validity of a state statute cannot be drawn into question in a state court by oral argument, not a part of the record. In the case of *Zadig v. Baldwin*, 166 U.S. 485, 41 L.Ed 1087, 17 S.Ct. 639 (1897), the Court stated at page 488:

> The contention that there was a Federal question raised below finds its only support in the fact that there has been printed in the record, as filed in this court, what purports to be an extract from the closing brief of counsel presented to the supreme court of the state, in which such a Federal question is discussed, and it is asserted orally at bar *that in the oral argument made in the Supreme Court of California* a claim under the Federal Constitution was presented. But, manifestly, *the matters referred to form no part of the record* and are not adequate to create a Federal question when no such question was necessarily decided below, and *the record does not disclose that such issues were set up or claimed in any proper manner in the courts of the state.* (Emphasis added.)

The Court dismissed the *Zadig* appeal for want of jurisdiction. Similarly, in the case of *Lynch v. New York ex rel Pierson*, 293 U.S. 52, 79 L.Ed 191, 55 S.Ct. 16 (1934), Petitioner sought a writ of certiorari to the Supreme Court of the State of New York. Chief Justice

Hughes in delivering the opinion of the Court stated at page 54:

> [J]urisdiction cannot be founded upon surmise. Nor can claim of jurisdiction be sustained by reference to briefs and *statements which are not a part of the record.* It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. (Emphasis added.)

The record (as admitted at page 18-19 of the Petition) does not disclose that a federal question was necessary to the determination of Causes 48708 or 48709, nor does it show that a federal question was actually decided or that the judgment rendered by the Oklahoma Supreme Court could not have been given without deciding a federal question. Petitioners' oral argument of the Fifth and Fourteenth Amendments, not of record, did not properly draw into question the validity of an Oklahoma statute.

Petitioners' final jurisdictional argument is that the federal questions purportedly involved in Causes 48708 and 48709 arose *after* the Oklahoma Supreme Court's decision of Causes 48708 and 48709. At page 19 of the Petition, it is stated:

> It did not appear that violation of Amendments V and XIV was in issue in the cases. The Supreme Court of Oklahoma entered its order of December 9, 1975, merely stating, "Oral Argument and Rehearing Denied." It became an obvious issue in these cases from which writs are sought when the federal district court refused to allow elements of trespass damages included as an element of damages when it granted Respondent a new trial on (visible) surface damages only, even though Petitioner Darks requested a new trial on trespass damages and other elements of damages.

Petitioner is arguing in the above-quoted language that the Federal District Court's decision retroactively injected a federal question into Causes 48708 and 48709. Petitioners' failure to properly raise and preserve a federal question in the Oklahoma Supreme Court in Causes 48708 and 48709 cannot be rectified by an order of the United States District Court for the Eastern District of Oklahoma.

Petitioner has wholly failed to show this Court in its Petition for Writ of Certiorari that any federal question was properly presented to the state court for decision or decided by the state court. Having failed to establish jurisdiction in this Court, Petitioners' application for a writ of certiorari to the Supreme Court of Oklahoma should be denied.

II. THE FEDERAL QUESTIONS PURPORTEDLY RAISED BY PETITIONER HAVE BEEN HERETOFORE DETERMINED BY THIS COURT.

The questions presented for review by Petitioner are:

(A) Whether a party with the power of eminent domain can trespass if the condemnor's entry onto the landowner's property occurred prior to the time permitted for entry onto the land in a condemnation action.

(B) Whether the landowner can halt the alleged trespass (the taking) by a temporary restraining order or injunction.

(C) Whether a party with the power of eminent domain is required to pay damages resulting from the alleged trespass (the taking).

(D) Whether the landowner has an adequate remedy for the alleged trespass (the taking).

Assuming arguendo that Petitioner had properly raised the above questions in the Supreme Court of Oklahoma, this Court's prior decisions would be determinative of those questions.

(A) A party lawfully exercising the power of eminent domain cannot be guilty of trespass. Pursuant to the statutes of the State of Oklahoma, 66 O.S. §§53-55, and the Oklahoma Constitution, OKLA. CONST. art.2, §24, a party with the power of eminent domain can condemn property by filing a condemnation action, having commissioners appointed, paying the commissioners' award into court, and entering into possession of the land. Thereafter, either the condemnor or condemnee may timely file exceptions to the commissioners' report, timely file a demand for a jury trial to judicially

determine the just compensation to which the landowner is entitled, or both. If a party with the power of eminent domain does not follow the condemnation procedure prescribed by 66 O.S. §§53-55 and OKLA CONST. art.2, §24, but simply enters into possession of the land, is this entry and taking a trespass?

The Oklahoma Supreme Court has repeatedly held that a landowner's *exclusive* remedy for an entry and taking is inverse condemnation, and that a landowner does *not* have a cause of action in trespass. *Delhi Gas Pipeline Corporation v. Swanson*, 520 P.2d 670 (Okl. 1974), *Graham v. City of Duncan*, 354 P.2d 458 (Okl. 1960), *Cities Service Gas Co. v. Huebner*, 197 P.2d 985 (Okl. 1948), and *Oklahoma City v. Wells*, 91 P.2d 1077 (Okl. 1939). The Oklahoma decisions are in line with the case of *Kaukauna Water Power Co. v. Green Bay & Miss. Canal Co.*, 142 U.S. 254, 35 L.Ed. 1004, 12 S.Ct. 173 (1891), in which the Supreme Court of the United States stated at page 280:

> Where a statute for the condemnation of lands provides a definite and complete remedy for obtaining compensation, *this remedy is exclusive; the common law remedy* or proceeding *is superseded* by the statute, and the owner must pursue the course pointed out by it. (Emphasis added.)

An entry and taking, which occurs prior to the time

permitted in a condemnation action, is not a trespass, neither is it unconstitutional. In the case of *Bailey v. Anderson*, 326 U.S. 203, 90 L.Ed. 3, 66 S.Ct. 66 (1945), the United States Supreme Court denied a petition for a writ of certiorari and dismissed the cause for want of a properly presented substantial federal question, stating at pages 204-205:

> Appellant contends here, as he did in the state courts, that [the state statute] infringes the asserted constitutional immunity by sanctioning appellee's entry upon the land and the alteration of its physical condition, in advance of the appointment of the commissioners and before they could view the land for the purpose of fixing its fair value upon condemnation. But it has long been settled that *due process does not require the condemnation of land to be in advance of its occupation by the condemning authority*, provided only that the owner have opportunity, in the course of the condemnation proceedings, to be heard and to offer evidence as to the value of the land taken. [Numerous citations omitted.] (Emphasis added.)

The Oklahoma Supreme Court in granting the writs of prohibition in Causes 48708 and 48709 followed an unbroken line of authority holding that a landowner's exclusive remedy for an entry and taking lies in inverse condemnation. The Oklahoma Supreme Court in granting the writs of prohibition against Judge Seay merely reversed the trial court's erronerous decision to allow the

Petitioners[1] a remedy other than the *exclusive* remedy of inverse condemnation. By prior decision, this Court has already determined that due process is not offended by a condemnor's entry onto the land of the property owner prior to the time permitted in a condemnation

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[1]Petitioner Darks argues on behalf of Petitioner Greasy Creek Cattle Company, that the alleged partnership was not made a party defendant in the pending condemnation actions; consequently, it does not have a remedy to recover its damages. In Oklahoma Supreme Court Causes 48708 and 48709, Respondent questioned the very existence of the Greasy Creek Cattle Company. In oral argument before the Oklahoma Supreme Court and at page 3 of Transok's Response to Petition for Rehearing (App.A, p. 94a), the Respondent challenged the existence of the alleged partnership by reference to the pleadings of the Petitioner, Maxwell Darks. In said documents, Maxwell Darks was shown to be the owner of the real property and the owner of the cattle, and Mr. Starks was shown to be merely the caretaker of the cattle on the Darks' property. Respondent herein noted that the Greasy Creek Cattle Company was never mentioned in said pleadings of Maxwell Darks; furthermore, the Oklahoma Supreme Court in its order of September 8, 1975, stated:

> It further appearing to this Court that such last-mentioned causes of action were filed by the owner of lands sought to be condemned and his *alleged* partner against the petitioner herein and that they sound in tort (trespass) and seek damages against the real premises and personalty located thereon. (Emphasis added.)

Petitioner desires to embroil this Court in the factual quagmire of the existence of the alleged partnership; but, assuming arguendo that Petitioner Greasy Creek Cattle Company does exist, the alleged partner Darks (Petitioner herein) is already a party to said pending Hughes County condemnation actions and has entered an appearance therein; consequently, the alleged partnership is already a party in said actions and may raise and recover its alleged damages in those actions.

action, and the prior decisions of this Court and the Oklahoma Supreme Court have held that a condemning authority's entry and taking, which occurs prior to the time permitted for entry in a condemnation action, is not a trespass.

(B) Petitioner argues that the statutes of the State of Oklahoma do not provide adequate procedural safeguards against an entry and taking by a condemning authority, in violation of due process of law, complaining that the landowner is without a remedy to halt the taking by resort to a temporary restraining order or injunction. It is argued, at pages 23-24 of the Petition, that the landowner is entitled to a hearing to challenge the entry and taking by the condeming authority before the condemnor has entered into possession of the property. Once again, the purported federal question has been determined by the prior decisions of this Court. In the case of *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 69 L.Ed. 953, 45 S.Ct. 491 (1925), the Court stated at page 284:

> There remains for consideration the plaintiff's objection that the statutory method of giving notice of the proposed location of the road under §2525 of the statute was insufficient, and *that plaintiff was afforded no opportunity for a hearing before* either the appraisers or the board of county commissioners with respect either to the location of the road, or the damage suffered by plaintiff by the opening of the road. The taking of property provided for by the

statute is a taking of land under the direction of public officers for a public use. *As was held in Bragg v. Weaver, supra,* [251 U.S. 57, 64 L.Ed. 135, 40 S.Ct. 62 (1919)], *the necessity and expediency of the taking of property for public use "are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process under the section of the 14th Amendment."* (Emphasis added.)

The rule of law stated in *North Laramie Land Co.* has been cited by this Court with such regularity, that an annotation concerning said rule appears at 1 L.Ed. 2d 1636-1637:

> Notice in Condemnation Proceedings, Necessity of Notice; Time When Notice Must Be Given; §3[a] Notice to Owner; Distinction Between Taking and Compensation, Notice of Taking Property:
>
> Where the taking of property is for a public use, the due process clause of the Fourteenth Amendment does not require that the necessity and expediency of the taking be determined upon notice and hearing.[12] [n.12: Sears v Akron (1918) 246 US 242, 62 L ed 688, 38 S Ct 245, infra; Bragg v Weaver (1919) 251 US 57, 64 L ed 135, 40 S Ct 62, infra, §5; Joslin Mfg. Co. v Providence (1923) 262 US 668, 67 L ed 1167, 43 S Ct 684, infra; Rindge Co. v Los Angeles County (1923) 262 US 700, 67 L ed 1186, 43 S Ct 689, infra; Georgia v Chattanooga (1924) 264 US 472, 68 L ed 796, 44 S Ct 369 (holding that the lack of opportunity to be heard before the passage of an ordinance opening a street is no ground for complaint); North Laramie Land Co. v Hoffman

(1925) 268 US 276, 69 L ed 953, 45 S Ct 491, infra, §6. Dicta to the contrary can no longer be regarded as authority. See, for instance, Carson v Brockton Sewer Comrs. (1901) 182 US 398, 45 L ed 1151, 21 S Ct 860, where the court said: "There is no doubt that, when land is proposed to be taken and devoted to the public service, or any serious burden is laid upon it, the owner of the land must be given an opportunity to be heard with respect to the necessity of the taking. . . . " See also North Laramie Land Co. v Hoffman (1925) 268 US 276, 69 L ed 953, 45 S Ct 491, infra, §6 (last sentence in quotation from court's opinion).] The rule has been rested on the ground that these questions are legislative rather than judicial in nature, *no matter who may be charged with their determination.* Due process does not require the condemnation of land to be in advance of its occupation by the condemning authority, so long as the owner has opportunity, in the course of the condemnation proceedings, to be heard and to offer evidence as to the value of the land taken. (Emphasis added.)

Petitioner argues that a landowner must be provided the procedural safeguard of a hearing to question the taking and halt the taking by a restraining order or injunction, but the numerous decisions of this Court, above cited, have rejected that argument.

(C) Is a party with the power of eminent domain required to pay damages resulting from its entry and taking ("trespass")? A condemnor must, of course, pay just compensation for the damages resulting from its

taking. The order of the Oklahoma Supreme Court in Causes 48708 and 48709 did not challenge the due process requirement that just compensation be paid by a condemning authority for its taking.

(D) Does a landowner have an adequate remedy under the statutes of the State of Oklahoma for a condemnor's taking ("trespass") which occurs prior to the time permitted in a condemnation action? The remedy of a landowner for an entry and taking, where no condemnation action has been filed, 's to file an *inverse* condemnation action pursuant to the provisions of 66 O.S. 1971 §57 and the provisions of 66 O.S. 1973 §53, which state, respectively, in pertinent part:

> Provided, that in case any *corporation* or municipality authorized to exercise the right of eminent domain shall have taken and occupied, for purposes for which it *might have resorted to condemnation proceedings*, as provided in this article, any land without having purchased or condemned the same, *the damage thereby inflicted upon the owner of such land shall be determined in the manner provided in this article for condemnation proceedings.* (Emphasis added.)

> [T]he district judge of the county in which said real property may be situated, shall, upon the application or petition of *either party*, and after ten (10) days' notice to the opposite party, direct the sheriff of said county to summon three (3) disinterested free-holders, to be selected by said judge as commissioners, and who shall not be interested in a like question. (Emphasis added.)

The statutory procedure of inverse condemnation affords the land-owner an opportunity to be heard, offer evidence as to the value of the land taken, and obtain the just compensation to which the landowner is entitled for any entry and taking by a condemning authority, which occurs prior to the time permitted for entry onto the land in a condemnation action.

Nevertheless, Petitioner argues that the United States District Court for the Eastern District of Oklahoma has indicated that it will not allow testimony of *trespass* damages at the forthcoming jury trial of Case No. 73-186-C. The Eastern District order merely reflects the rule of law, discussed *supra*, that a condemnor's taking is not a trespass. This not to say that Petitioner will not be allowed to introduce evidence of condemnation damages; the Eastern District indicated it would allow testimony as to surface damage and when the Hughes County condemnation actions C-73-93 (48054), C-73-94 (48055), and C-73-95 (48056) have been decided by the Oklahoma Supreme Court and remanded to the trial court, Petitioner will be free to present testimony as to Petitioner's damages sustained incident to Respondent's taking.

The order of the Oklahoma Supreme Court in Causes 48708 and 48709 did not deny Petitioners their remedy of inverse condemnation (or condemnation).

Assuming arguendo that Petitioner had properly

raised the above questions in the state court, should this Court grant the Petition for Writ of Certiorari? Supreme Court Rule 19(1) (a) states:

> A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons which will be considered:
>
> > Where a state court has decided a federal question of substance *not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court*. (Emphasis added.)

In the case at bar, each and every one of the federal questions allegedly raised by Petitioner in the state court have been heretofore determined by this Court. The Petition for Writ of Certiorari to the Supreme Court of Oklahoma should be denied.

III. THIS COURT LACKS JURISDICTION OF THE COLLATERAL CASES DISCUSSED BY PETITIONER.

A substantial portion of the Petition for Writ of Certiorari to the Supreme Court of Oklahoma is concerned with three collateral cases: (A) Corporation Commission Cause No. 35868, in which Order No. 96291 was issued; (B) the three consolidated Hughes County

condemnation actions, No. C-73-93, C-73-94, and C-73-95, which are presently on appeal to the Oklahoma Supreme Court as Causes No. 48054, 48055, and 48056, respectively; and (C) the condemnation action now pending in the United States District Court for the Eastern District of Oklahoma, No. 73-186-C. Ostensibly, Petitioner is seeking a writ of certiorari only on the writ of prohibition actions, Causes 48708 and 48709; however, Petitioner insists on raising questions incident to the three aforementioned collateral causes, despite the fact that this Court does not have jurisdiction of those issues.

(A) Corporation Commission Order No. 96291 was entered on March 5, 1973. Petitioner herein sought to have that order reviewed by the Oklahoma Supreme Court, but failed to timely file an appeal from that order as indicated by the Oklahoma Supreme Court's decision in the case of *Transok Pipe Line Co. v. Darks*, 515 P.2d 218 (Okl. 1973). Having failed to timely raise his objections to Order No. 96291 in the Oklahoma Supreme Court, Petitioner attempts to raise those objections with this Court, three years out of time in a cause purportedly seeking a review only of the writ of prohibition cases. This Court should not assume jurisdiction under 28 U.S.C. §1257(3) to review an order which has been final for three years and which the highest court of a state has refused to review. Petitioners' attack on Corporation Commission Order No. 96291 is an extra-

legal argument, and this Honorable Court should not assume jurisdiction of that cause.

(B) The Hughes County condemnation actions, No. C-73-93, C-73-94, and C-73-95, are presently on appeal to the Oklahoma Supreme Court as Causes No. 48054, 48055, and 48056, respectively, and are consolidated under No. 48054. The Hughes County condemnation appeals are awaiting decision by the Oklahoma Supreme Court; in fact, Petitioner has not filed, to date, his reply brief in those actions. At page 32-33 of the Petition for Writ of Certiorari, it is stated:

> By granting the Writs of Prohibition in the two cases herein, the Supreme Court of Oklahoma has made an unwritten predetermination (outside the scope of due process of law), that when all briefs are finally submitted in the three related condemnation cases appealed from the Hughes County District Court, and now pending before the Supreme Court of Oklahoma, the Court *will write a decision in those cases showing that these condemnation cases have proceeded according to due process of law with no remedy for trespass to be adjudicated therein . . . Petitioners would have included those three companion cases in this writ of certiorari had the unwritten decision been reduced to a written decision at the time this petition seeking writ of certiorari was prepared.* (Emphasis added.)

Petitioners' prediction of the Oklahoma Supreme Court's decision in Causes 48054, 48055, and 48056 is not tantamount to a final order by the Oklahoma Supreme

Court in those causes. Absent a final order, this Court should not assume jurisdiction under 28 U.S.C. §1257(3) to review Petitioners' attack on the three Hughes County condemnation appeals, even if a federal question had been raised therein.

(C) The condemnation action now *pending* on the jury trial docket of the United States District Court for the Eastern District of Oklahoma, Case No. 73-186-C, is not yet ripe for review by this Court as no final order has been entered in that case. Furthermore, a final decision in said Eastern District action would be reviewable by the Tenth Circuit Court of Appeals, not this Court. Absent a final order in the trial court, an appeal to the Tenth Circuit, and a final order in the Tenth Circuit, this Court should not accept jurisdiction to consider Petitioners' attack on the Eastern District condemnation action, 73-186-C, and cannot accept jurisdiction under 28 U.S.C. §1257(3).

This Court should not accept jurisdiction to consider the extralegal arguments advanced by Petitioners concerning the aforementioned collateral cases.

CONCLUSION

Petitioner prays that this Court grant a Writ of Certiorari to the Supreme Court of Oklahoma to review that court's decision in Causes 48708 and 48709. The Petition for Writ of Certiorari to the Supreme Court of

Oklahoma should be denied because this Court does not have jurisdiction of this cause for the following reasons:

(1) No state statute was properly drawn into question in the state court as being repugnant to the United States Constitution; consequently, there is no federal question before this Court.

(2) Even if the purported federal questions had been properly presented and preserved in the state court, this Court's prior decisions are determinative of all questions raised by Petitioners.

(3) Of the three collateral cases discussed by Petitioner, two are not ripe for decision by this Court, and one is beyond the time for appeal to this Court and could not have been appealed to this Court in any event, since the decision therein was not by the highest court of Oklahoma.

Apart from the jurisdictional reasons for denying the Petition for Writ of Certiorari to the Supreme Court of Oklahoma, this Court should deny the petition, because the decision of the Oklahoma Supreme Court in Causes 48708 and 48709 was correct, accurate, and fair. The decision of the Oklahoma Supreme Court in holding that a landowner does not have a cause of action in trespass against a party lawfully exercising the power of eminent domain was correct; in that, it was in accord with long-standing federal and state decisions holding that condemnation or inverse condemnation is a landowner's *exclusive* remedy for a *taking* of his property. Petitioner

has shown this Court nothing to warrant a re-examination of a settled point in the law of eminent domain which has stood the test of time — a rule of law which includes a remedy for the landowner and yet allows an orderly taking by a condemnor without undue delay. The decision of the Oklahoma Supreme Court was fair; in that, it does not foreclose Petitioners' recovery of their damages occasioned by Respondent's taking. Petitioner Darks is already a party in the Hughes County and federal condemnation actions, and Petitioner Greasy Creek Cattle Company is already a party in said Hughes County actions by virtue of the alleged partner Darks' appearance in those actions, who may claim the damage of the alleged partnership in those actions.

For the foregoing reasons, Respondent respectfully urges this Court to deny the Petition for Writ of Certiorari to the Supreme Court of Oklahoma.

Respectfully submitted,

Robert L. Lawrence
Kenneth W. East
Kevin M. Abel

2932 First National Tower
Tulsa, Oklahoma 74103
Telephone: (918) 583-3611

April, 1976

APPENDICES

APPENDIX A
(Orders and Pleadings Below)

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, a corporation, Petitioner, vs. FRANK SEAY, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Respondent.	Supreme Ct. No. 48708 District Ct. No. C-74-250

APPLICATION TO ASSUME
ORIGINAL JURISDICTION

Comes now the Petitioner, Transok Pipe Line Company, a corporation, and respectfully prays this Court to assume jurisdiction in an original proceeding under Petitioner's Writ of Prohibition and Brief in Support of Petition for Writ of Prohibition, copies of which are attached hereto, for the following reasons, to-wit:

I.

That on the 26th day of November, 1974, Maxwell Darks filed a trespass action against the Petitioner in the District Court of Hughes County, State of Oklahoma, District Court No. C-74-250, praying for damages in the amount of $130,000, allegedly resulting from the supposed trespass. Proper notice was given the Defendant, Transok Pipe Line Company, and the Petitioner, herein, entered its appearance in said trespass action on December 26, 1974. Thereafter, on the 24th day of January, 1975, Transok Pipe Line Company filed its Demurrer to Plaintiff's Petition on the grounds that, " . . . the Petition does not state a cause of action against the Defendant

in that the allegations made in such Petition are properly adjudicable in an action in eminent domain rather than tort and that actions in eminent domain are presently pending before this Court." On or about the 28th day of February, 1975, Maxwell Darks filed his Amended Petition; however, the defect raised by the Demurrer of Transok Pipe Line Company was not cured by said Amended Petition, and on the 19th day of June, 1975, the Demurrer of Transok Pipe Line Company was argued before the Honorable Frank Seay. By Order of the Honorable Frank Seay, Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, on June 19, 1975, entered and filed on the 26th day of June, 1975, Petitioner's Demurrer was erroneously and improperly overruled.

II.

That the relief sought in this original proceeding, a Writ of Prohibition, is against the Honorable Frank Seay, Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, for the reason that Respondent's overruling of said Demurrer was contrary to law and will result in irreparable damage and harm to Petitioner, if said District Court is allowed to proceed.

III.

That the relief sought in this original proceeding is within the superintending control of this court.

TRANSOK PIPE LINE COMPANY
Petitioner

By: /s/ Robert L. Lawrence
Robert L. Lawrence

By: /s/ Charles B. Crane
Charles B. Crane

By: /s/ Kevin M. Abel
Kevin M. Abel

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IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, a corporation, Petitioner, vs. FRANK SEAY, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Respondent.	Supreme Ct. No. 48709 District Ct. No. C-74-251

APPLICATION TO ASSUME
ORIGINAL JURISDICTION

Comes now the Petitioner, Transok Pipe Line Company, a corporation, and respectfully prays this Court to assume jurisdiction on an original proceeding under Petitioner's Writ of Prohibition and Brief in Support of Petition for Writ of Prohibition, copies of which are attached hereto, for the following reasons, to-wit:

I.

That on the 26th day of November, 1974, Maxwell Darks and Les Starks, d/b/a Greasy Creek Cattle Co., filed a trespass action against the Petitioner in the District Court of Hughes County, State of Oklahoma, District Court No. C-74-251, praying for damages in the amount of $124,800, allegedly resulting from the supposed trespass. Proper notice was given the Defendant, Transok Pipe Line Company, and the Petitioner herein, entered its appearance in said trespass action on December 26, 1974. Thereafter on the 24th day of January, 1975, Transok Pipe Line Company filed its Demurrer to Plaintiff's Petition on the grounds that, " . . . the Petition does not state a cause of action against the Defendant in that the allegations made in such Petition are properly

adjudicable in an action in eminent domain rather than tort and that actions in eminent domain are presently pending before this Court." On or about the 28th day of February, 1975, Maxwell Darks and Les Starks, d/b/a Greasy Creek Cattle Co., filed their Amended Petition; however, the defect raised by the Demurrer of Transok Pipe Line Company was not cured by said Amended Petition, and on the 19th day of June, 1975, the Demurrer of Transok Pipe Line Company was argued before the Honorable Frank Seay. By Order of the Honorable Frank Seay, Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, on June 19, 1975, entered and filed on the 26th day of June, 1975, Petitioner's Demurrer was erroneously and improperly overruled.

II.

That the relief sought in this original proceeding, a Writ of Prohibition, is against the Honorable Frank Seay, Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, for the reason that the Respondent's overruling of said Demurrer was contrary to law and will result in irreparable damage and harm to Petitioner if said District Court is allowed to proceed.

III.

That the relief sought in this original proceeding is within the superintending control of this Court.

TRANSOK PIPE LINE COMPANY,
Petitioner

By: /s/ Robert L. Lawrence
Robert L. Lawrence

/s/ Charles B. Crane
Charles B. Crane

/s/ Kevin M. Abel
Kevin M. Abel

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IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, a corporation, Petitioner, vs. FRANK SEAY, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Respondent.	Supreme Ct. No. 48708 District Ct. No. C-74-250

PETITION FOR WRIT OF PROHIBITION

Comes now the Petitioner, Transok Pipe Line Company, a corporation, and shows this Honorable Court:

I.

That Transok Pipe Line Company, a corporation, is a corporation duly organized under the laws of the State of Oklahoma, with its principal office and place of business located in Tulsa, Oklahoma. Transok Pipe Line Company, a corporation, is authorized and is qualified to engage in the business of transporting natural gas by pipeline and is authorized and qualified to distribute and sell the same to industrial consumers throughout the State of Oklahoma. By virtue of the public nature of its business, and specifically the provisions of 52 O.S. 1913, §§ 22 and 27; 52 O.S. 1951, §§ 36.1-36.7; 66 O.S. 1910, §§ 51, 52, 54, 56, 58, 59, and 60; 66 O.S. 1973 §53; 66 O.S. 1970, § 55, and the provisions of 66 O.S. 1929, § 57, it is endowed with the right of eminent domain in the appropriation and use of lands necessary to its authorized, lawful, and proper business endeavors described above.

II.

That pursuant to Petitioner's right of eminent domain, Transok Pipe Line Company, a corporation, sought an Order of the Oklahoma Corporation Commission, in Cause No. 35868, authorizing the use, for the purpose of the underground storage of natural gas, of the Channel Booch Formation more particularly described as follows, to-wit:

> The Channel Booch Formation is identified by the log on the Adelman No. 1-B Well, located in the center of the Northwest Quarter Northwest Quarter (NW 1/4 NW 1/4) of Section 28, Township 8 North, Range 11 East, Hughes County, Oklahoma, showing a top of approximately 2,496 feet and a base of approximately 2,556 feet; said Channel Booch Formation underlying the Northeast Quarter Northeast Quarter (NE 1/4 NE 1/4) of Section 2; North Half North Half (N 1/2 N 1/2) Section 1, Township 7 North, Range 10 East; East Half Southeast Quarter (E 1/2 SE 1/4) and Southeast Quarter Northeast Quarter (SE 1/4 NE 1/4) Section 35; South Half (S 1/2) and Northeast Quarter (NE 1/4) and South Half South Half Northwest Quarter (S 1/2 S 1/2 NW 1/4) of Section 36, Township 8 North, Range 10 East; Southwest Quarter (SW 1/4) and North Half North Half Southeast Quarter (N 1/2 N 1/2 SE 1/4) and North Half (N 1/2) of Section 31; South Half Southwest Quarter (S 1/2 SW 1/4) and Southeast Quarter (SE 1/4) Section 30; North Half Northwest Quarter (N 1/2 NW 1/4) and North Half South Half Northwest Quarter (N 1/2 S 1/2 NW 1/4) and North Half North Half Northeast Quarter (N 1/2 N 1/2 NE 1/4) Section 32; South Half (S 1/2) and Northeast Quarter (NE 1/4) and South Half Northwest Quarter (S 1/2 NW 1/4) and Northeast Quarter Northwest Quarter (NE 1/4 NW 1/4) Section 29; North Half Northwest Quarter Southeast Quarter (N 1/2 NW 1/4 SE 1/4) and North Half Southwest Quarter (N 1/2 SW 1/4) and North Half South Half Southwest Quarter (N 1/2 S 1/2 SW 1/4) Section 28; South Half Southwest Quarter Southeast Quarter (S 1/2 SW 1/4 SE 1/4) and Southeast Quarter Southeast Quarter (SE 1/4 SE 1/4) Section 20; South Half (S 1/2) and Northeast Quarter (NE 1/4) and Southeast Quarter Northwest Quarter (SE 1/4 NW 1/4) Section 21; West Half West Half (W 1/2 W 1/2) Section 22; West Half Northwest Quarter (W 1/2 NW 1/4) Section 27, Township 8 North, Range 11 East, Hughes County, Oklahoma.

The Corporation Commission of the State of Oklahoma, by Order No. 96291, granted the Application of the Petitioner, thereby holding that the Channel Booch Formation was suitable for the underground storage of natural gas and that Petitioner was authorized and empowered to use said Channel Booch Formation for the underground storage of natural gas. Said Order No. 96291 included a provision that it was the certificate required by 52 O.S. 1961, Section 36.4, which is a condition precedent to the filing of a petition for condemnation in the courts of the State of Oklahoma. Maxwell Darks appealed the Corporation Commission's decision in Case No. 35868 to the Oklahoma Supreme Court, Number 46762, but this Honorable Court dismissed said appeal. Thereafter, in the District Court of Hughes County, State of Oklahoma, the Petitioner filed the following cases: Transok Pipe Line Company, a corporation, v. Maxwell Darks, et al, No. C-73-93; Transok Pipe Line Company, a corporation, v. Maxwell Darks, C-73-94; Transok Pipe Line Company, a corporation, v. Maxwell Darks, et al, C-73-95; and Transok Pipe Line Company, a corporation, v. Maxwell Darks, et al, C-73-100. Maxwell Darks petitioned this court for a Writ of Prohibition,

Supreme Court No. 46719, seeking a determination that the Corporation Commission of the State of Oklahoma, in case No. 35868, and the District Court of Hughes County, in the District Court cases C-73-93 through C-73-102, of which Maxwell Darks was a party only in C-73-93, C-73-94, C-73-95, and C-73-100, were, in these actions, asserting an unauthorized and unlawful exercise of judicial power. This Honorable Court denied Maxwell Darks' prayer for a Writ of Prohibition, and said District Court cases proceeded according to the provisions of 66 O.S. §§ 53-63. In each of the aforementioned Hughes County District Court Cases, C-73-93, C-73-94, C-73-95, and C-73-100, Transok Pipe Line Company and Maxwell Darks filed their respective Demands for a Jury Trial, and in each of the Hughes County cases, the District Court approved the Commissioners Report and confirmed the taking by condemnation. Maxwell Darks appealed the Hughes County District Court cases of C-73-93, C-73-94, and C-73-95 to the Oklahoma Supreme Court, numbered by the Court, respectively, 48054, 48055, and 48056; said cases on appeal from the District Court of Hughes County are still pending before this Honorable Court. Maxwell Darks did not appeal the Hughes County District Court case of C-73-100. The jury trials in the Hughes County condemnation cases are pending subject to a decision by this Honorable Court in the aforementioned appeals; said pending jury trials, when held, will fully determine the rights of the condemnee and all damages to which he is entitled, incident to Petitioners taking in condemnation and its actions taken in furtherance of its underground gas storage project.

III.

On the 26th day of November, 1974, Maxwell Darks filed a trespass action in the District Court of Hughes

County, State of Oklahoma, No. C-74-250, praying for damages in the amount of $130,000, allegedly resulting from the supposed trespass of the Petitioner herein, Transok Pipe Line Company, a corporation. Proper notice was given the Defendant, Transok Pipe Line Company, and Petitioner entered its appearance on December 26, 1974. Thereafter, on the 24th day of January, 1975, Transok Pipe Line Company filed its Demurrer to Plaintiff's Petition on the grounds that, " . . . the Petition does not state a cause of action against the Defendant in that the allegations made in such Petition are properly adjudicable in an action in eminent domain rather than tort, and that actions in eminent domain are presently pending before this Court." Petitioner cited as its authority in support of said Demurrer the provisions of 66 O.S. 1910, §§ 51, 52, 54, 56, and 58; 66 O.S. 1973, § 53; 66 O.S. 1970, § 55; 66 O.S. 1929, § 57; 52 O.S. 1913, § 27; and the provisions of 52 O.S. 1959, §§ 36.1 through 36.7; and the case law authority of *Oklahoma City v. Wells*, 91 P2d 1077 (1939), and *Graham v. City of Duncan*, 354 P2d 458 (1960). On or about the 28th day of February, 1975, Maxwell Darks filed in the District Court Case C-74-250 his Amended Petition; however, the defect raised by the Demurrer of Transok Pipe Line Company was not cured by said Amended Petition, and on the 19th day of June, 1975, the Demurrer of Transok Pipe Line Company was argued before the Honorable Frank Seay. By Order of the Honorable Frank Seay, Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, on June 19, 1975, entered and filed on the 26th day of June, 1975, Petitioner's Demurrer was erroneously overruled, to which ruling the Petitioner, herein, excepted and its exception was allowed.

IV.

That as a result of the Respondent's erroneous ruling in said trespass action, C-74-250, said cause will continue in the District Court of Hughes County, unless prohibited by this Honorable Court, and said Respondent will proceed to have said cause tried in the District Court of Hughes County, and will render a decision therein, despite the fact, that the District Court of Hughes County has pending before it the condemnation jury trials that will fully determine the damages prayed for in the trespass action; thereby, making it possible for the condemnee to obtain a *double recovery* for Petitioner's entry onto and taking of the property, in question, and Petitioner's actions taken thereon in furtherance of its underground gas storage project.

V.

That Petitioner is without an adequate remedy at law; that a remedy by appeal or by any other method except by prohibition is inadequate and insufficient; in that, said cause will improperly proceed in the District Court of Hughes County; that said Respondent assumes to exercise judicial power not granted by law, and is attempting to make unauthorized application of judicial force and power; that Respondent is attempting to proceed with this cause, when as a matter of law, said cause should have been dismissed pursuant to Petitioner's Demurrer, and that the Petitioner is without any ordinary and usual remedy, or equal remedy save that this Court issue its Writ of Prohibition.

WHEREFORE, your Petitioner prays this Honorable Court issue its Writ of Prohibition directed to the Honorable Frank Seay, Respondent, herein, commanding him to cease, desist, and refrain from proceeding further in his capacity as Judge of the District Court of Hughes

County in the case of Maxwell Darks v. Transok Pipe Line Company, No. C-74-250.

TRANSOK PIPE LINE COMPANY

By: /s/ Robert L. Lawrence
Robert L. Lawrence

/s/ Charles B. Crane
Charles B. Crane

P. O. Box 201
Tulsa, OK 74102
Telephone (918) 583-3611

/s/ Kevin M. Abel
Kevin M. Abel
Attorneys for Petitioner

VERIFICATION BY ATTORNEY

STATE OF OKLAHOMA }
COUNTY OF TULSA } SS.

Charles B. Crane, being first duly sworn, deposes and says:

That he is one of the attorneys of record in the above entitled action; that he has personal knowledge of the facts of this cause, and that he has read the foregoing Petition for Writ of Prohibition, is familiar with the contents thereof, and believes that the facts therein set forth are true and correct.

/s/ Charles B. Crane
Charles B. Crane

Subscribed and sworn to before me this 17th day of July, 1975.

(SEAL)
My Commission expires:
2-5-78

/s/ Sharyn Manning
Notary Public

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, a corporation,
Petitioner,
vs.
FRANK SEAY, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma,
Respondent.

Supreme Ct. No. 48709
District Ct. No. C-74-251

PETITION FOR WRIT OF PROHIBITION

Comes now the Petitioner, Transok Pipe Line Company, a corporation, and shows this Honorable Court:

I.

That Transok Pipe Line Company, a corporation, is a corporation duly organized under the laws of the State of Oklahoma, with its principal office and place of business located in Tulsa, Oklahoma. Transok Pipe Line Company, a corporation, is authorized and is qualified to engage in the business of transporting natural gas by pipeline and is authorized and qualified to distribute and sell the same to industrial consumers throughout the State of Oklahoma. By virtue of the public nature of its business, and specifically the provisions of 52 O.S. 1913, §§ 22 and 27; 52 O.S. 1951, §§ 36.1-36.7; 66 O.S. 1910, §§ 51, 52, 54, 56, 58, 59, and 60; 66 O.S. 1973, Section 53; 66 O.S. 1970, Section 55, and the provisions of 66 O.S. 1929, Section 57, it is endowed with the right of eminent domain in the appropriation and use of lands necessary to its authorized, lawful, and proper business endeavors described above.

II.

That pursuant to Petitioner's right of eminent domain, Transok Pipe Line Company, a corporation, sought an Order of the Oklahoma Corporation Commission, in Cause No. 35868, authorizing the use, for the purpose of the underground storage of natural gas, of the Channel Booch Formation more particularly described as follows, to-wit:

> The Channel Booch Formation is identified by the log on the Adelman No. 1-B Well, located in the center of the Northwest Quarter Northwest Quarter (NW 1/4 NW 1/4) of Section 28, Township 8 North, Range 11 East, Hughes County, Oklahoma, showing a top of approximately 2,496 feet and a base of approximately 2,556 feet; said Channel Booch Formation underlying the Northeast Quarter Northeast Quarter (NE 1/4 NE 1/4) of Section 2, North Half North Half (N 1/2 N 1/2) Section 1, Township 7 North, Range 10 East; East Half Southeast Quarter (E 1/2 SE 1/4) and Southeast Quarter Northeast Quarter (SE 1/4 NE 1/4) Section 35; South Half (S 1/2) and Northeast Quarter (NE 1/4) and South Half South Half Northwest Quarter (S 1/2 S 1/2 NW 1/4) of Section 36, Township 8 North, Range 10 East; Southwest Quarter (SW 1/4) and North Half North Half Southeast Quarter (N 1/2 N 1/2 SE 1/4) and North Half (N 1/2) of Section 31; South Half Southwest Quarter (S 1/2 SW 1/4) and Southeast Quarter (SE 1/4) Section 30; North Half Northwest Quarter (N 1/2 NW 1/4) and North Half South Half Northwest Quarter (N 1/2 S 1/2 NW 1/4) and North Half North Half Northeast Quarter (N 1/2 N 1/2 NE 1/4) Section 32; South Half (S 1/2) and Northeast Quarter (NE 1/4) and South Half Northwest Quarter (S 1/2 NW 1/4) and Northeast Quarter Northwest Quarter (NE 1/4 NW 1/4) Section 29; North Half Northwest Quarter Southeast Quarter

(N 1/2 NW 1/4 SE 1/4) and North Half Southwest Quarter (N 1/2 SW 1/4) and North Half South Half Southwest Quarter (N 1/2 S 1/2 SW 1/4) Section 28; South Half Southwest Quarter Southeast Quarter (S 1/2 SW 1/4 SE 1/4) and Southeast Quarter Southeast Quarter (SE 1/4 SE 1/4) Section 20; South Half (S 1/2) and Northeast Quarter (NE 1/4) and Southeast Quarter Northwest Quarter (SE 1/4 NW 1/4) Section 21; West Half West Half (W 1/2 W 1/2) Section 22; West Half Northwest Quarter (W 1/2 NW 1/4) Section 27, Township 8 North, Range 11 East, Hughes County, Oklahoma.

The Corporation Commission of the State of Oklahoma, by Order No. 96291, granted the Application of the Petitioner, thereby holding that the Channel Booch Formation was suitable for the underground storage of natural gas and that Petitioner was authorized and empowered to use said Channel Booch Formation for the underground storage of natural gas. Said Order No. 96291 included a provision that it was the certificate required by 52 O.S. 1961, Section 36.4, which is a condition precedent to the filing of a petition for condemnation in the courts of the State of Oklahoma. Maxwell Darks appealed the Corporation Commission's decision in Case No. 35868 to the Oklahoma Supreme Court, Supreme Court No. 46762, but this Honorable Court dismissed said appeal. Thereafter, in the District Court of Hughes County, State of Oklahoma, the Petitioner filed the following cases: Transok Pipe Line Company, a corporation, v. Maxwell Darks, et al, No. C-73-93; Transok Pipe Line Company, a corporation, v. Maxwell Darks, C-73-94; Transok Pipe Line Company, a corporation, v. Maxwell Darks, et al, C-73-95; and Transok Pipe Line Company, a corporation, v. Maxwell Darks, et al, C-73-100. Maxwell Darks petitioned this court for a Writ of Prohibition,

Supreme Court No. 46719, seeking a determination that the Corporation Commission of the State of Oklahoma, in Case No. 35,868, and the District Court of Hughes County, in the District Court cases C-73-93 through C-73-102, of which Maxwell Darks was a party only in C-73-93, C-73-94, C-73-95, and C-73-100, were, in these actions, asserting an unauthorized and unlawful exercise of judicial power. This Honorable Court denied Maxwell Darks' prayer for a Writ of Prohibition, and said District Court cases proceeded according to the provisions of 66 O.S. §§ 53-63. In each of the aforementioned Hughes County District Court cases, C-73-93, C-73-94, C-73-95, and C-73-100, Transok Pipe Line Company and Maxwell Darks filed their respective demands for a jury trial, and in each of the Hughes County cases, the District Court approved the Commissioners Report and confirmed the taking by condemnation. Maxwell Darks appealed the Hughes County District Court cases of C-73-93, C-73-94, and C-73-95 to the Oklahoma Supreme Court, Numbered by the Court, respectively, 48054, 48055, and 48056; said cases on appeal from the District Court of Hughes County are still pending before this Honorable Court. Maxwell Darks did not appeal the Hughes County District Court case of C-73-100. The jury trials in the Hughes County condemnation cases are pending subject to a decision by this Honorable Court in the aforementioned appeals; said pending jury trials, when held, will fully determine the rights of the condemnees and all damages to which they are entitled, incident to Petitioners taking in condemnation and its actions taken in furtherance of its underground gas storage project.

III.

On the 26th day of November, 1974, Maxwell Darks and Les Starks, d/b/a Greasy Creek Cattle Co., filed a trespass action in the District Court of Hughes County,

State of Oklahoma, No. C-74-251, praying for damages in the amount of $124,800, allegedly resulting from the supposed trespass of the Petitioner herein, Transok Pipe Line Company, a corporation. Proper notice was given the Defendant, Transok Pipe Line Company, and Petitioner entered its appearance on December 26, 1974. Thereafter, on the 24th day of January, 1975, Transok Pipe Line Company filed its Demurrer to Plaintiff's Petition on the grounds that, " . . . the Petition does not state a cause of action against the Defendant in that the allegations made in such Petition are properly adjudicable in an action in eminent domain rather than tort, and that actions in eminent domain are presently pending before this court." Petitioner cited as its authority in support of said Demurrer the provisions of 66 O.S. 1910, §§ 51, 52, 54, 56, and 58; 66 O.S. 1973, § 53; 66 O.S. 1970, § 55; 66 O.S. 1929, § 57; 52 O.S. 1913, § 27; and the provisions of 52 O.S. 1951, §§ 36.1 through 36.7; and the case law authority of *Oklahoma City v. Wells*, 91 P2d 1077 (1939), and *Graham v. City of Duncan*, 354 P2d 458 (1960). On or about the 28th day of February, 1975, Maxwell Darks and Les Starks, d/b/a Greasy Creek Cattle Co., filed in the District Court Case C-74-251 their Amended Petition; however, the defect raised by the Demurrer of Transok Pipe Line Company was not cured by said Amended Petition, and on the 19th day of June, 1975, the Demurrer of Transok Pipe Line Company was argued before the Honorable Frank Seay. By Order of the Honorable Frank Seay, Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, on June 19, 1975, entered and filed on the 26th day of June, 1975, Petitioner's Demurrer was erroneously overruled, to which ruling the Petitioner, herein, excepted and its exception was allowed.

IV.

That as a result of the Respondent's erroneous ruling in said trespass action, C-74-251, said cause will continue in the District Court of Hughes County, unless prohibited by this Honorable Court, and said Respondent will proceed to have said cause tried in the District Court of Hughes County, and will render a decision therein, despite the fact, that the District Court of Hughes County has pending before it the condemnation jury trials that will fully determine the damages prayed for in the trespass action; thereby, making it possible for the condemnees to obtain a *double recovery* for Petitioner's entry onto and taking of the property, in question, and Petitioner's actions taken thereon in furtherance of its underground gas storage project.

V.

That Petitioner is without an adequate remedy at law; that a remedy by appeal or by any other method except by prohibition is inadequate and insufficient; in that, said cause will improperly proceed in the District Court of Hughes County; that said Respondent assumes to exercise judicial power not granted by law, and is attempting to make unauthorized application of judicial force and power; that Respondent is attempting to proceed with this cause, when as a matter of law, said cause should have been dismissed pursuant to Petitioner's Demurrer, and that the Petitioner is without any ordinary and usual remedy, or equal remedy save that this Court issue its Writ of Prohibition.

WHEREFORE, your Petitioner prays this Honorable Court issue its Writ of Prohibition directed to the Honorable Frank Seay, Respondent, herein, commanding him to cease, desist, and refrain from proceeding further in his capacity as Judge of the District Court of Hughes

County in the case of Maxwell Darks and Les Starks, d/b/a Greasy Creek Cattle Co. v. Transok Pipe Line Company, No. C-74-251.

TRANSOK PIPE LINE COMPANY

By: /s/ Robert L. Lawrence
Robert L. Lawrence

/s/ Charles B. Crane
Charles B. Crane

P. O. Box 201
Tulsa, OK 74102
Telephone (918) 583-3611

/s/ Kevin M. Abel
Kevin M. Abel
Attorneys for Petitioner

VERIFICATION BY ATTORNEY

STATE OF OKLAHOMA } SS.
COUNTY OF TULSA }

Charles B. Crane, being first duly sworn, deposes and says:

That he is one of the attorneys of record in the above entitled action; that he has personal knowledge of the facts of this cause, and that he has read the foregoing Petition for Writ of Prohibition, is familiar with the contents thereof, and believes that the facts therein set forth are true and correct.

/s/ Charles B. Crane
Charles B. Crane

Subscribed and sworn to before me this 17th day of July, 1975.

(SEAL)
My Commission expires:
2-5-78

/s/ Sharyn Manning
Notary Public

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, a corporation,
Petitioner,
vs.
FRANK SEAY, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma.

Supreme Ct. No. 48708
District Ct. No. C-74-250

BRIEF IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION

STATEMENT OF FACTS

Petitioner, Transok Pipe Line Company, a corporation, sought an Order of the Oklahoma Corporation Commission, in Cause No. 35868, authorizing the use, for the purpose of the underground storage of natural gas of the Channel Booch Formation underlying Hughes County (more particularly described in the Petition for Writ of Prohibition). The Corporation Commission, by Order No. 96291, granted Petitioner's Application, and held that the Channel Booch Formation was suitable for the underground storage of natural gas, and that Petitioner was authorized and empowered to use said formation for the underground storage of natural gas. Said Order No. 96291 included a provision that it was the certificate required by 52 O.S. 1961, § 36.4, which is a condition precedent to the filing of a petition for condemnation in the courts of the State of Oklahoma. Maxwell Darks appealed the Corporation Commission's decision in Case No. 35868 to the Oklahoma Supreme Court, Supreme Court No. 46762, but this Honorable Court dismissed said appeal.

Thereafter, in the District Court of Hughes County, State of Oklahoma, Petitioner filed a series of condemnation actions, and Maxwell Darks was a party in the actions numbered: C-73-93, C-73-94, C-73-95, and C-73-100. Maxwell Darks petitioned this Court for a Writ of Prohibition, Supreme Court No. 46719, seeking a determination that the Corporation Commission of the State of Oklahoma, in Case No. 35868, and the District Court of Hughes County, in the District Court cases of C-73-93 through C-73-102 (of which Darks was a party only in C-73-93, C-73-94, C-73-95, and C-73-100) were asserting in these actions an unauthorized and unlawful exercise of judicial power. This Honorable Court denied Maxwell Darks' prayer for a Writ of Prohibition, and said District Court cases proceeded according to the provisions of 66 O.S. Sections 53 - 60. In each of the aforementioned Hughes County District Court cases, C-73-93, C-73-94, C-73-95, and C-73-100, Transok Pipe Line Company and Maxwell Darks filed their respective demands for a jury trial, and in each of the Hughes County cases, the District Court approved the Commissioners' Report and confirmed the taking by condemnation. Maxwell Darks appealed the Hughes County District Court cases of C-73-93, C-73-94, and C-73-95, to the Oklahoma Supreme Court, numbered by the Court, respectively, 48054, 48055, and 48056; said cases, on appeal from the District Court of Hughes County, are still pending before this Honorable Court. The jury trials in the Hughes County condemnation cases are pending subject to a decision by this Honorable Court in the aforementioned appeals; said pending jury trials, when held, will fully determine the rights of the Condemnee and all damages to which he is entitled, incident to Petitioner's taking in condemnation and its actions taken in furtherance of its underground gas storage project.

On November 26, 1974, Maxwell Darks filed a trespass action in the District Court of Hughes County, State of Oklahoma, No. C-74-250, praying for damages in the amount of $130,000, allegedly resulting from the supposed trespass of the Petitioner, Transok Pipe Line Company, a corporation. Proper notice was given the Defendant, Transok Pipe Line Company, and Petitioner entered its appearance on December 26, 1974. Thereafter, on the 24th day of January, 1975, Transok Pipe Line Company filed its Demurrer to Plaintiff's Petition on the grounds that said Petition did not state a cause of action against the Defendant, because Plaintiff's exclusive remedy lay in the pending condemnation cases heretofore mentioned. On or about the 28th day of February, 1975, Maxwell Darks filed his Amended Petition; however, the defects raised by the Demurrer of Transok Pipe Line Company were not cured by said Amended Petition, and on the 19th day of June, 1975, the Demurrer of Transok Pipe Line Company was argued before the Honorable Frank Seay. By Order of the Honorable Frank Seay, Judge of the District Court of Hughes County, on June 19, 1975, which was entered and filed on the 26th day of June, 1975, Petitioner's Demurrer was erroneously overruled, to which ruling the Petitioner excepted and its exception was allowed.

FIRST PROPOSITION

RESPONDENT ERRONEOUSLY OVERRULED PETITIONER'S DEMURRER, SINCE A CONDEMNEE'S EXCLUSIVE REMEDY IS IN A CONDEMNATION ACTION — THERE BEING NO CAUSE OF ACTION IN TORT.

Damages sustained by a landowner incident to a Condemnor's actions, are recoverable *only* in a *condemnation* proceeding. In the case of *Oklahoma City v.*

Wells, 91 P2d 1077 (1939), the Oklahoma Supreme Court decided the question of what remedy a landowner has when his property has been taken by a corporation endowed with the right of eminent domain. The Court stated in the Wells case, that the constitutional and statutory remedy of condemnation was a landowner's exclusive remedy. The Court explained, "In *Stedman v. State Highway Commission*, 174 Okl. 308, 50 P2d 657, it is held [page 658]: 'By the provisions of §§ 11931 - 11934, O.S. 1931, 66 Okl.St.Ann. §§ 53 - 56, the state has provided an adequate remedy for the determination of damages to private persons for property taken or damaged by the state for public use, and such remedy is exclusive.' " The Court further stated:

> In 10 R.C.L. § 190, p. 223, it is said: "It is settled by the great preponderance of authority, that when land is taken or damaged by authority of a constitutional statute and in compliance with its provisions, and the statute provides a means of recovering damages which may be instituted by the owner of the land, the statutory remedy is exclusive. When the act of the public authorities in entering upon and occupying private land, which they have taken by eminent domain in the manner provided by statute, or of making such use of land taken as will necessarily injure neighboring land, is expressly authorized by a statute which provides for the ascertainment and payment of just compensation, such an act is not in any sense wrongful or tortious and cannot be made the basis of an action of *trespass* or any other action sounding in tort. A common law action sounding in contract for the value of the land taken will not lie, for there is no implied contract to pay for it except in the manner provided by the statute: ° ° °." [Emphasis added]

In the 1952 case of *Morton v. Okmulgee Producers and Manufacturers Gas Co.*, 248 P2d 1028 (1952), the Supreme Court of the State of Oklahoma decided an action involving a company endowed with the right of eminent domain. At p. 1029 of the *Morton* case, the Court stated:

> "Our Legislature has further provided in Title 66 O.S. 1941, § 57 that in case any corporation or municipality authorized to exercise the right of eminent domain shall have taken and occupied for purposes for which it might have resorted to condemnation proceedings, as provided in this article, any land, without having purchased or condemned the same, the damage thereby inflicted upon the owner of such land shall be determined in the manner provided in this article for condemnation proceedings. This section gives the landowner the right, if the taking corporation does not follow the procedures set out, to condemn the property, to file his petition in the nature of condemnation to fix the damages to his land in the same manner and method as would be followed if the taking corporation filed condemnation procedure."

The Court then made reference to the case of *Oklahoma City v. Wells*, *supra*, holding that a landowner's exclusive remedy is in a condemnation proceeding.

In the case of *Graham v. City of Duncan*, 354 P2d 458 (1960), the Oklahoma Supreme Court decided an action against a municipality for the destruction of a crop. The Court held in the *Graham* case that even if there had been no necessity for the Condemnor's destroying the crop, the Condemnee's exclusive remedy was to have the amount of damages determined in a condemnation case, and that the Condemnee could not thereafter maintain an action for the damages, unless some items of damages had been removed from deter-

mination and reserved for future consideration by agreement between the parties, with the approval of the Court. (In the case at Bar, no items of damages were ever removed from determination in the above mentioned condemnation actions of Hughes County.) The Court stated in the *Graham* case that where the statutes have provided an adequate remedy for the determination of damages, resulting from the taking of property for public use, the statutory remedy is exclusive. The Court then quoted the case of *State of Oklahoma v. Adams*, 105 P2d 416 (1940):

> " ° ° ° that the owner must recover in one action 'all damages which have resulted, or are reasonably liable to result in the future, from a proper construction or operation of the improvement, and that no subsequent action will lie to recover for items which were, or might have been, considered in the original proceedings.' "

The Court also quoted Nichols on Eminent Domain, 3rd Ed. Vol. 6, § 24.2(3), pp. 36-37, " 'After judgment has been entered, it is conclusive as to all damages which were or might have been included in the award, and the owner cannot thereafter maintain an action in common law for such damages.' "

The items of damages to be considered in a condemnation jury trial, where defined by the Oklahoma Supreme Court in the case of *Cities Service Gas Company vs. Huebner*, 197 P2d 985 (1948). The Court held that the jury was to consider, in the valuation of condemnation damages, all resultant damages and such wrongful acts (including trespass and negligence) as were incidental to the condemnation works, if the works are completed prior to trial. (In the case at Bar, the Petitioner's taking and it's actions incident to its gas storage

project are already completed; hence, they have been completed prior to the pending jury trials in the condemnation actions and the damages prayed for in the trespass action will be considered by the jury at the condemnation trial.) The Court in the *Cities Service* case stated that it had, in earlier cases,

> " . . . pointed out that the condemnee is entitled to be fully compensated for his damages irrespective of negligence. In this connection see 124 A.L.R. 416, Note. Some of the cases holding that no allowance can be made for wilful or negligent acts were cases where the trial was had before the works were constructed, which is clearly correct, since damages for such acts that may not occur would be based entirely upon conjecture and speculation. We are committed to the rule that, where the trial is had after the works are completed, it is proper to assess the damages on the basis of the facts existing at the time of the trial, since the element of conjecture and speculation is then absent. State v. Winters, 195 Okl. 243, 156 P2d 798; Arkansas Valley & W. Ry. Co. v. Witt, 19 Okl. 262, 91 P. 897, 13 L.R.A., N.S., 237. The rule allowing the jury to consider the damages resulting from trespass or negligence, where the works are completed at the time of the trial, is based upon two reasons, (1) to avoid a multiplicity of suits as stated in Arkansas Missouri Power Co. v. Killian, 225 Mo. App. 454, 40 S.W.2d 730, 732, and to avoid placing an undue burden upon the condemnee, whose property is taken without his consent, and (2) that the condemnor should not be heard to urge its own wrongs to mitigate the damages, as said in United Power & Light Corporation v. Murphy, 135 Kan. 100, 9 P.2d 658, 663."

In 1974, the Oklahoma Supreme Court decided a case whose facts are very similar to the facts of the case

at Bar, *Delhi Gas Pipeline Corporation v. Swanson*, 520 P2d 670 (1974). In the *Delhi* case, Petitioner was a gas pipeline corporation that had entered upon the Condemnee's land and started construction of a pipeline; thereafter, Delhi filed a condemnation proceeding in which the Report of the Commissioners was approved and the District Court determined that Delhi had the right to exercise the power of eminent domain and that the taking was necessary. Subsequent to the District Court condemnation action, the landowners filed suit against Delhi alleging that the Company was guilty of trespass and sought actual and punitive damages, and injunctive relief. Delhi filed its Demurrer and Motion To Dismiss in the trespass action on the grounds that the Condemnees were required to recover their damages in the pending condemnation proceedings, and on the grounds that the Court did not have jurisdiction of the subject matter and that the Petition failed to state sufficient facts to constitute a cause of action. (In the case at Bar, Petitioner's Demurrer attacked Condemnee's Petition on the grounds that the Condemnee's rights were properly adjudicable in the pending eminent domain actions and that the Petition did not state a cause of action.) The trial court in the Delhi case overruled Delhi's Demurrer and Motion To Dismiss and set the case for jury trial; whereupon, Delhi sought a Writ of Prohibition to prevent the trial court from proceeding further with the landowners' trespass action. The Oklahoma Supreme Court held that the landowner could recover in a condemnation proceeding for all the land taken or damaged by the Condemnor, Delhi Gas Pipeline Corporation, and that the condemnation proceeding was the only place where the landowners could recover damages. The Court cited the holding in the *Graham v. City of Duncan* case, *supra*, — a Condemnee must make his

total recovery, for all the damages that have resulted or are reasonably liable to result in the future from the Condemnor's taking, in an eminent domain proceeding, and that no subsequent action, such as a trespass action, would lie. The Court also cited the holding in *Cities Service Gas Co. v. Huebner*, *supra*, "In Cities Service Gas Co. v. Huebner, 200 Okl. 521, 197 P2d 985, we held that in situations where the works have been completed prior to trial in the condemnation proceeding, the condemnee may recover in the condemnation proceeding for all of his damages, irrespective of negligence."

It is apparent from the authorities cited above, that a Condemnee's *sole* remedy for any and all damages incident to a Condemnor's taking of the landowner's property, is in a condemnation action. No cause of action at common law, including trespass, may be resorted to by the landowner. In the case at Bar, the damages of the Condemnee prayed for in the trespass action will be fully determined in the pending Hughes County condemnation jury trials. Since the Condemnee's sole remedy is in the pending eminent domain jury trial, and since it has been held that a trespass action will not lie for damages resulting from a Condemnor's taking by condemnation, the Honorable Frank Seay, Judge of the District Court of Hughes County, was in error in overruling Petitioner's Demurrer in the case of *Maxwell Darks v. Transok Pipe Line Company*, a corporation, C-74-250.

SECOND PROPOSITION

A WRIT OF PROHIBITION SHOULD BE ISSUED SINCE RESPONDENT WAS IN ERROR IN OVERRULING PETITIONER'S DEMURRER.

Under a clear line of Oklahoma authority, the Supreme Court, in an original jurisdiction proceeding, pur-

suant to its constitutional power of superintending control, can issue a Writ of Prohibition to restrain the further prosecution of a case, after a lower court has erroneously failed to sustain a Demurrer. In the case of *Board of Commissioners of Harmon County v. Keen*, 153 P2d 483 (1944), the Court issued a Writ of Prohibition to the Judge of the District Court of Harmon County, who had erroneously overruled Defendant's Demurrer to a tort action. The Court, having determined that the Plaintiff had no cause of action in tort against the Defendant, stated, "We have long been committed to the rule that 'prohibition is the proper remedy, where an inferior court assumes to exercise judicial power not granted by law, or is attempting to make an excessive and unauthorized application of judicial force in a cause otherwise properly cognizable by it.' *State ex rel Haskell v. Huston*, 21 Okl. 782, 97 P. 982." The Court then stated that no cause of action existed nor could one be stated and that a Writ of Prohibition should be issued as prayed for. In the 1970 case of *Hyman-Michaels Co. v. Hampton*, 471 P2d 463 (1970), the Supreme Court of the State of Oklahoma again held that prohibition was the proper remedy to restrain a court from proceeding further in an action, after erroneously refusing to sustain a Demurrer. In the previously discussed case of *Delhi Gas Pipeline Corporation v. Swanson, supra*, the Supreme Court, having determined that the Condemnees' damages were to be determined solely in the pending condemnation action, issued a Writ of Prohibition to Judge Swanson, Judge of the District Court of Blaine County, because he had overruled Delhi's Demurrer to the trespass action.

CONCLUSION

The authorities cited above hold:

(1) A Condemnee's exclusive remedy is in a condemnation proceeding;

(2) No common law cause of action, such as trespass, will lie for the taking of property by condemnation, and

(3) A Writ of Prohibition should be issued when a Demurrer is erroneously overruled.

In the case at Bar, Maxwell Darks' exclusive remedy for *all* his damages sustained as a result of Petitioner's taking by condemnation, lies in the condemnation jury trials currently pending before the District Court of Hughes County. Pursuant to the above authorities, Maxwell Darks does *not* have a cause of action in trespass against the Petitioner, Transok Pipe Line Company. No cause of action can be stated in trespass, as no cause of action exists in trespass against a Condemnor. The Respondent's failure to sustain Petitioner's Demurrer was clearly erroneous; consequently, the Respondent is attempting to exercise judicial power not granted by law and is attempting to make an unauthorized application of judicial force and power by attempting to proceed with this action. As a result of the Respondent's actions, the trespass action will continue, as will the condemnation actions, and it will be possible for the Condemnee to obtain a *double recovery* for Petitioner's completed works incident to Petitioner's entry onto and taking of the property, in question, and Petitioner's actions taken thereon in furtherance of its underground gas storage project. Subsequent to the Respondent's erroneous overruling of Petitioner's Demurrer, the Petitioner is without any remedy, whatsoever, save this Court issue its Writ of Prohibition directing the Honorable Frank Seay, Judge of the District Court of Hughes County, to cease, desist, and refrain from proceeding further in the case of *Maxwell Darks v. Transok Pipe Line Company*, C-74-250.

THEREFORE, pursuant to the law and the facts of the case at Bar, Petitioner respectfully requests that this Honorable Court issue its Writ of Prohibition as prayed for.

RESPECTFULLY SUBMITTED,
TRANSOK PIPE LINE COMPANY

By: /s/ Robert L. Lawrence
Robert L. Lawrence

/s/ Charles B. Crane
Charles B. Crane

/s/ Kevin M. Abel
Kevin M. Abel
Attorneys for Petitioner

P. O. Box 201
Tulsa, OK 74102
Telephone: (918) 583-3611

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, a corporation, Petitioner, vs. FRANK SEAY, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma	Supreme Ct. No. 48709 District Ct. No. C-74-251

BRIEF IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION

STATEMENT OF FACTS

Petitioner, Transok Pipe Line Company, a corporation, sought an Order of the Oklahoma Corporation Commission, in Cause No. 35868, authorizing the use, for the purpose of the underground storage of natural gas of the Channel Booch Formation underlying Hughes County (more particularly described in the Petition for Writ of Prohibition). The Corporation Commission, by Order No. 96291, granted Petitioner's Application, and held that the Channel Booch Formation was suitable for the underground storage of natural gas, and that Petitioner was authorized and empowered to use said formation for the underground storage of natural gas. Said Order No. 96291 included a provision that it was the certificate required by 52 O.S. 1961, § 36.4, which is a condition precedent to the filing of a petition for condemnation in the courts of the State of Oklahoma. Maxwell Darks appealed the Corporation Commission's decision in Case No. 35868 to the Oklahoma Supreme Court, Supreme Court No. 46762, but this Honorable Court dismissed said appeal.

Thereafter, in the district Court of Hughes County, State of Oklahoma, Petitioner filed a series of condemnation actions, and Maxwell Darks was a party in the actions numbered: C-73-93, C-73-94, C-73-95, and C-73-100. Maxwell Darks petitioned this Court for a Writ of Prohibition, Supreme Court No. 46719, seeking a determination that the Corporation Commission of the State of Oklahoma, in Case No. 35868, and the District Court of Hughes County, in the District Court cases of C-73-93 through C-73-102 (of which Darks was a party only in C-73-93, C-73-94, C-73-95, and C-73-100) were asserting in these actions an unauthorized and unlawful exercise of judicial power. This Honorable Court denied Maxwell Darks' prayer for a Writ of Prohibition, and said District Court cases proceeded according to the provisions of 66 O.S. §§ 53-60. In each of the aforementioned Hughes County District Court cases, C-73-93, C-73-94, C-73-95, and C-73-100, Transok Pipe Line Company, and Maxwell Darks filed their respective demands for a jury trial, and in each of the Hughes County cases, the District Court approved the Commissioners' Report and confirmed the taking by condemnation. Maxwell Darks appealed the Hughes County District Court cases of C-73-93, C-73-94, and C-73-95, to the Oklahoma Supreme Court, numbered by the Court, respectively, 48054, 48055, and 48056; said cases, on appeal from the District Court of Hughes County, are still pending before this Honorable Court. The jury trials in the Hughes County condemnation cases are pending subject to a decision by this Honorable Court in the aforementioned appeals; said pending jury trials, when held, will fully determine the rights of the condemnees and all damages to which they are entitled, incident to Petitioner's taking in condemnation and its actions taken in furtherance of its underground gas storage project.

On November 26, 1974, Maxwell Darks and Les Starks, d/b/a Greasy Creek Cattle Co., filed a trespass action in the District Court of Hughes County, State of Oklahoma, No. C-74-251, praying for damages in the amount of $124,800, allegedly resulting from the supposed trespass of the Petitioner, Transok Pipe Line Company, a corporation. Proper notice was given the Defendant, Transok Pipe Line Company, and Petitioner entered its appearance on December 26, 1974. Thereafter, on the 24th day of January, 1975, Transok Pipe Line Company filed its Demurrer to Plaintiffs' Petition on the grounds that said Petition did not state a cause of action against the Defendant, because Plaintiffs' exclusive remedy lay in the pending condemnation cases heretofore mentioned. On or about the 28th day of February, 1975, Maxwell Darks and Les Starks, d/b/a Greasy Creek Cattle Co., filed their Amended Petition; however, the defects raised by the Demurrer of Transok Pipe Line Company were not cured by said Amended Petition, and on the 19th day of June, 1975, the Demurrer of Transok Pipe Line Company was argued before the Honorable Frank Seay. By Order of the Honorable Frank Seay, Judge of the District Court of Hughes County, on June 19, 1975, which was entered and filed on the 26th day of June, 1975, Petitioner's Demurrer was erroneously overruled, to which ruling the Petitioner excepted and its exception was allowed.

FIRST PROPOSITION

RESPONDENT ERRONEOUSLY OVERRULED PETITIONER'S DEMURRER, SINCE A CONDEMNEE'S EXCLUSIVE REMEDY IS IN A CONDEMNATION ACTION — THERE BEING NO CAUSE OF ACTION IN TORT.

Damages sustained by a landowner incident to a Condemnor's actions, are recoverable *only* in a *condemnation* proceeding. In the case of *Oklahoma City v. Wells*, 91 P2d 1077 (1939), the Oklahoma Supreme Court decided the question of what remedy a landowner has when his property has been taken by a corporation endowed with the right of eminent domain. The Court stated in the *Wells* case, that the constitutional and statutory remedy of condemnation was a landowner's exclusive remedy. The Court explained, "In *Stedman v. State Highway Commission*, 174 Okl. 308, 50 P2d 657, it is held [page 658]: 'By the provisions of §§ 11931-11934, O.S. 1931, 66 Okl. St.Ann. §§ 53-56, the state has provided an adequate remedy for the determination of damages to private persons for property taken or damaged by the state for public use, and such remedy is exclusive.' " The Court further stated:

In 10 R.C.L. § 190, p. 223, it is said: "It is settled by the great preponderance of authority, that when land is taken or damaged by authority of a constitutional statute and in compliance with its provisions, and the statute provides a means of recovering damages which may be instituted by the owner of the land, the statutory remedy is exclusive. When the act of the public authorities in entering upon and occupying private land, which they have taken by eminent domain in the manner provided by statute, or of making such use of land taken as will necessarily injure neighboring land, is expressly authorized by a statute which provides for the ascertainment and payment of just compensation, such an act is not in any sense wrongful or tortious and cannot be made the basis of an action of *trespass* or any other action sounding in tort. A common law action sounding in contract for the value of the land taken will not lie, for there is no implied

contract to pay for it except in the manner provided by the statute:' * * *." [Emphasis added]

In the 1952 case of *Morton v. Okmulgee Producers and Manufacturers Gas Co.*, 248 P2d 1028 (1952), the Supreme Court of the State of Oklahoma decided an action involving a company endowed with the right of eminent domain. At p. 1029 of the *Morton* case, the Court stated:

> "Our Legislature has further provided in Title 66 O.S. 1941, § 57 that in case any corporation or municipality authorized to exercise the right of eminent domain shall have taken and occupied for purposes for which it might have resorted to condemnation proceedings, as provided in this article, any land, without having purchased or condemned the same, the damage thereby inflicted upon the owner of such land shall be determined in the manner provided in this article for condemnation proceedings. This section gives the landowner the right, if the taking corporation does not follow the procedures set out, to condemn the property, to file his petition in the nature of condemnation to fix the damages to his land in the same manner and method as would be followed if the taking corporation filed condemnation procedure."

The Court then made reference to the case of *Oklahoma City v. Wells, supra*, holding that a landowner's exclusive remedy is a condemnation proceeding.

In the case of *Graham v. City of Duncan*, 354 P2d 458 (1960), the Oklahoma Supreme Court decided an action against a municipality for the destruction of a crop. The Court held in the *Graham* case that even if there had been no necessity for the Condemnor's destroying the crop, the Condemnee's exclusive remedy was to have the amount of damages determined in a

condemnation case, and that the Condemnee could not thereafter maintain an action for the damages, unless some items of damages had been removed from determination and reserved for future consideration by agreement between the parties, with the approval of the Court. (In the case at Bar, no items of damages were ever removed from determination in the above mentioned condemnation actions of Hughes County.) The Court stated in the *Graham* case that where the statutes have provided an adequate remedy for the determination of damages, resulting from the taking of property for public use, the statutory remedy is exclusive. The Court then quoted the case of *State of Oklahoma v. Adams*, 105 P2d 416 (1940):

> "'°°°that the owner must recover in one action 'all damages which have resulted, or are reasonably liable to result in the future, from a proper construction or operation of the improvement, and that no subsequent action will lie to recover for items which were, or might have been, considered in the original proceedings.' "

The Court also quoted Nichols on Eminent Domain, 3rd Ed. Vol. 6, § 24.2(3), pp. 36-37, " 'After judgment has been entered, it is conclusive as to all damages which were or might have been included in the award, and the owner cannot thereafter maintain an action in common law for such damages.' "

The items of damages to be considered in a condemnation jury trial, where defined by the Oklahoma Supreme Court in the case of *Cities Service Gas Company vs. Huebner*, 197 P2d 985 (1948). The Court held that the jury was to consider, in the valuation of condemnation damages, all resultant damages and such wrongful acts (including trespass and negligence) as were incidental to the condemnation works, if the works are

completed prior to trial. (In the case at Bar, the Petitioner's taking and it's actions incident to its gas storage project are already completed; hence, they have been completed prior to the pending jury trials in the condemnation actions and the damages prayed for in the trespass action will be considered by the jury at the condemnation trial.) The Court in the *Cities Service* case stated that it had, in earlier cases,

> ". . . pointed out that the condemnee is entitled to be fully compensated for his damages irrespective of negligence. In this connection see 124 A.L.R. 416, Note. Some of the cases holding that no allowance can be made for wilful or negligent acts were cases where the trial was had before the works were constructed, which is clearly correct, since damages for such acts that may not occur would be based entirely upon conjecture and speculation. We are committed to the rule that, where the trial is had after the works are completed, it is proper to assess the damages on the basis of the facts existing at the time of the trial, since the element of conjecture and speculation is then absent. State v. Winters, 195 Okl. 243, 156 P.2d 798; Arkansas Valley & W. Ry. Co. v. Witt, 19 Okl. 262, 91 P. 897 13 L.R.A.,N.S., 237. The rule allowing the jury to consider the damages resulting from trespass or negligence, where the works are completed at the time of trial, is based upon two reasons, (1) to avoid a multiplicity of suits as stated in Arkansas Missouri Power Co. v. Killian, 225 Mo. App. 454,40 S.W.2d 730, 732, and to avoid placing an undue burden upon the condemnee, whose property is taken without his consent, and (2) that the condemnor should not be heard to urge its own wrongs to mitigate the damages, as said in United Power & Light Corporation v. Murphy, 135 Kan. 100, 9 P.2d 658, 663."

In 1974, the Oklahoma Supreme Court decided a case whose facts are very similar to the facts of the case at Bar, *Delhi Gas Pipeline Corporation v. Swanson*, 520 P2d 670 (1974). In the *Delhi* case, Petitioner was a gas pipeline corporation that had entered upon the Condemnee's land and started construction of a pipeline; thereafter, Delhi filed a condemnation proceeding in which the Report of the Commissioners was approved and the District Court determined that Delhi had the right to exercise the power of eminent domain and that the taking was necessary. Subsequent to the District Court condemnation action, the land-owners filed suit against Delhi alleging that the Company was guilty of trespass and sought actual and punitive damages, and injunctive relief. Delhi filed its Demurrer and Motion To Dismiss in the trespass action on the ground that the Condemnees were required to recover their damages in the pending condemnation proceedings, and on the grounds that the Court did not have jurisdiction of the subject matter and that the Petition failed to state sufficient facts to constitute a cause of action. (In the case at Bar, Petitioner's Demurrer attacked Condemnees' Petition on the grounds that the Condemnees' rights were properly adjudicable in the pending eminent domain actions and that the Petition did not state a cause of action.) The trial court in the *Delhi* case overruled Delhi's Demurrer and Motion to Dismiss and set the case for jury trial; whereupon, Delhi sought a Writ of Prohibition to prevent the trial court from proceeding further with the landowners' trespass action. The Oklahoma Supreme Court held that the landowner could recover in a condemnation proceeding for all the land taken or damaged by the condemnor, Delhi Gas Pipeline Corporation, and that the condemnation proceeding was the only place where the landowners could recover

damages. The court cited the holding in the *Graham v. City of Duncan* case, *supra*, - a Condemnee must make his total recovery, for all the damages that have resulted or are reasonably liable to result in the future from the Condemnor's taking, in an eminent domain proceeding, and that no subsequent action, such as a trespass action, would lie. The Court also cited the holding in *Cities Service Gas Co. v. Huebner, supra*, "In *Cities Service Gas Co. v. Huebner*, 200 Okl. 521, 197 P.2d 985, we held that in situations where the works have been completed prior to trial in the condemnation proceeding, the condemnee may recover in the condemnation proceeding for all of his damages, irrespective of negligence."

It is apparent from the authorities cited above, that a Condemnee's *sole* remedy for any and all damages incident to a Condemnor's taking of the landowner's property, is in a condemnation action. No cause of action at common law, including trespass, may be resorted to by the landowner. In the case at Bar, the damages of the Condemnees prayed for in the trespass action will be fully determined in the pending Hughes County condemnation jury trials. Since the Condemnees' sole remedy is in the pending eminent domain jury trial, and since it has been held that a trespass action will not lie for damages resulting from a Condemnor's taking by condemnation, the Honorable Frank Seay, Judge of the District Court of Hughes County, was in error in overruling Petitioner's Demurrer in the case of *Maxwell Darks and Les Starks, d/b/a Greasy Creek Cattle Co.*, a corporation, C-74-251.

SECOND PROPOSITION

A WRIT OF PROHIBITION SHOULD BE ISSUED SINCE RESPONDENT WAS IN ERROR IN OVERRULING PETITIONER'S DEMURRER.

Under a clear line of Oklahoma authority, the Supreme Court, in an original jurisdiction proceeding, pursuant to its constitutional power of superintending control, can issue a Writ of Prohibition to restrain the further prosecution of a case, after a lower court has erroneously failed to sustain a Demurrer. In the case of *Board of Commissioners of Harmon County v. Keen* 153 P2d 483 (1944), the Court issued a Writ of Prohibition to the Judge of the District Court of Harmon County, who had erroneously overruled Defendant's Demurrer to a tort action. The Court, having determined that the Plaintiff had no cause of action in tort against the Defendant, stated, "We have long been committed to the rule that 'prohibition is the proper remedy, where an inferior court assumes to exercise judicial power not granted by law, or is attempting to make an excessive and unauthorized application of judicial force in a cause otherwise properly cognizable by it.' *State ex rel Haskell v. Huston*, 21 Okl. 782, 97 P. 982." The Court then stated that no cause of action existed nor could one be stated and that a Writ of Prohibition should be issued as prayed for. In the 1970 case of *Hyman-Michaels Co. v. Hampton*, 471 P2d 463 (1970), the Supreme Court of the State of Oklahoma again held that prohibition was the proper remedy to restrain a court from proceeding further in an action, after erroneously refusing to sustain a Demurrer. In the previously discussed case of *Delhi Gas Pipeline Corporation v. Swanson, supra*, the Supreme Court, having determined that the Condemnees' damages were to be determined solely in the pending condemnation action, issued a Writ of Prohibition to Judge Swanson, Judge of the District Court of Blaine County, because he had overruled Delhi's Demurrer to the trespass action.

CONCLUSION

The authorities cited above hold:

(1) A Condemnee's exclusive remedy is in a condemnation proceeding;

(2) No common law cause of action, such as trespass, will lie for the taking of property by condemnation, and

(3) A Writ of Prohibition should be issued when a Demurrer is erroneously overruled.

In the case at Bar, the exclusive remedy of Maxwell Darks and Les Starks d/b/a Greasy Creek Cattle Co., for *all* their damages sustained as a result of Petitioner's taking by condemnation, lies in the condemnation jury trials currently pending before the District Court of Hughes County. Pursuant to the above authorities, Maxwell Darks and Les Starks, d/b/a Greasy Creek Cattle Co., do *not* have a cause of action in trespass against the Petitioner, Transok Pipe Line Company. No cause of action can be stated in trespass, as no cause of action exists in trespass against a Condemnor. The Respondent's failure to sustain Petitioner's Demurrer was clearly erroneous; consequently, the Respondent is attempting to exercise judicial power not granted by law and is attempting to make an unauthorized application of judicial force and power by attempting to proceed with this action. As a result of the Respondent's actions, the trespass action will continue, as will the condemnation actions, and it will be possible for the Condemnees to obtain a *double recovery* for Petitioner's completed works incident to Petitioner's entry onto and taking of the property, in question, and Petitioner's actions taken thereon in furtherance of its underground gas storage project. Subsequent to the Respondent's erroneous overruling of Petitioner's Demurrer, the Petitioner is without

any remedy, whatsoever, save this Court issue its Writ of Prohibition directing the Honorable Frank Seay, Judge of the District Court of Hughes County, to cease, desist, and refrain from proceeding further in the case of *Maxwell Darks and Les Starks, d/b/a Greasy Creek Cattle Co., v. Transok Pipe Line Company*, No. C-74-251.

THEREFORE, pursuant to the law and the facts of the case at Bar, Petitioner respectfully requests that this Honorable Court issue its Writ of Prohibition as prayed for.

Respectfully submitted,

TRANSOK PIPE LINE COMPANY

By: /s/ Robert L. Lawrence
Robert L. Lawrence
/s/ Charles B. Crane
Charles B. Crane
/s/ Kevin M. Abel
Kevin M. Abel
Attorneys for Petitioner

P. O. Box 201
Tulsa, OK 74102
Telephone: (918) 583-3611

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY
a corporation,
Petitioner
vs.
FRANK SEAY, the Honorable Judge
of the District Court of the
22nd Judicial District, County
of Hughes, States of Oklahoma,
Respondent.

Supreme Ct.
No. 48708
District Ct.
No. C-74-250

NOTICE

TO: Frank Seay, the Honorable Judge of the District Court of Hughes County, State of Oklahoma, and Maxwell Darks

Take notice that on the following Application to Assume Original Jurisdiction, verified Petition for Writ of Prohibition, and Brief in Support of Petition for Writ of Prohibition, copies of which are attached hereto, the Petitioner, Transok Pipe Line Company, a corporation, will move the Supreme Court of the State of Oklahoma on the 5th day of August, 1975, at 1:30 o'clock a.m., at the opening court of that day, or as soon thereafter as counsel can be heard, for an Alternative Writ of Prohibition to issue out of said Court directed to the Honorable Frank Seay, Judge of the District Court of Hughes County, and Maxwell Darks, ordering them to desist and refrain from any further proceedings in the action entitled and numbered: Maxwell Darks, Plaintiff,

v. Transok Pipe Line Company, Defendant, C-74-250, and for such other relief as may be just.

TRANSOK PIPE LINE COMPANY,
Petitioner

By: /s/ Robert L. Lawrence
Robert L. Lawrence

/s/ Charles B. Crane
Charles B. Crane

/s/ Kevin M. Abel
Kevin M. Abel

P. O. Box 201
Tulsa, OK 74102
Telephone: (918) 583-3611

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, a corporation, Petitioner, vs. FRANK SEAY, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Respondent.	Supreme Ct. No. 48709 District Ct. No. C-74-251

NOTICE

TO: Frank Seay, the Honorable Judge of the District Court of Hughes County, State of Oklahoma, and Maxwell Darks and Les Starks, d/b/a Greasy Creek Cattle Co.

Take notice that on the following Application to Assume Original Jurisdiction, verified Petition for Writ of Prohibition, and Brief in Support of Petition for Writ of Prohibition, copies of which are attached hereto, the Petitioner, Transok Pipe Line Company, a corporation, will move the Supreme Court of the State of Oklahoma on the 5th day of August, 1975, at 1:30 o'clock a.m., at the opening court of that day, or as soon thereafter as counsel can be heard, for an Alternative Writ of Prohibition to issue out of said court directed to the Honorable Frank Seay, Judge of the District Court of Hughes County, and Maxwell Darks and Les Starks d/b/a Greasy Creek Cattle Co., ordering them to desist and refrain from any further proceedings in the action entitled and numbered: Maxwell Darks and Les Starks, d/b/a Greasy Creek Cattle Co., Plaintiff, v. Transok Pipe

Line Company, Defendant, C-74-231, and for such other relief as may be just.

TRANSOK PIPE LINE COMPANY
Petitioner

By: /s/ Robert L. Lawrence
Robert L. Lawrence

/s/ Charles B. Crane
Charles B. Crane

/s/ Kevin M. Abel
Kevin M. Abel

P. O. Box 201
Tulsa, OK 74102
Telephone (918) 583-3611

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, a corporation, Petitioner, vs. FRANK SEAY, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Respondent.	Supreme Ct. No. 48708 Dist. Ct. No. C-74-250

AFFIDAVIT OF SERVICE

Kevin M. Abel, of lawful age, being first duly sworn, deposes and says:

That I am an attorney for the Petitioner in the above entitled cause, and that on the 18th day of July, 1975, I provided for the delivery of a true and correct copy of Petitioner's Application to Assume Original Jurisdiction, Petition for Writ of Prohibition, Brief in Support of Petition for Writ of Prohibition, and Notice thereof, to the Honorable Frank Seay, Respondent, Hughes County Court House, Holdenville, Oklahoma, and to Robert G. Grove and Carl Michael Smith, attorneys for Maxwell Darks, 324 N. Robinson, Suite 300, Oklahoma City, Oklahoma.

/s/ Kevin M. Abel
Kevin M. Abel
Attorney for Transok Pipe Line Company, Petitioner

P.O. Box 201
Tulsa, OK 74102
Telephone: (918) 583-3611

Subscribed and sworn to before me this 17th day of July, 1975.

/s/ Sharyn Manning
Notary Public

(SEAL)

My Commission expires: 2-5-78

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY a corporation, Petitioner, vs. FRANK SEAY, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Respondent.	Supreme Ct. No. 48709 District Ct. No. C-74-251

AFFIDAVIT OF SERVICE

Kevin M. Abel, of lawful age, being first duly sworn, deposes and says:

That I am an attorney for the Petitioner in the above entitled cause, and that on the 18th day of July, 1975, I provided for the delivery of a true and correct copy of Petitioner's Application to Assume Original Jurisdiction, Petition for Writ of Prohibition, Brief in Support of Petition for Writ of Prohibition, and Notice thereof, to the Honorable Frank Seay, Respondent, Hughes County Court House, Holdenville, Oklahoma, and to Robert G. Grove and Carl Michael Smith, attorneys for Maxwell Darks and Les Starks, d/b/a Greasy Creek Cattle Co., 324 N. Robinson, Suite 300, Oklahoma City, Oklahoma.

/s/ Kevin M. Abel
Kevin M. Abel
Attorney for Transok Pipe Line Company, Petitioner

P. O. Box 201
Tulsa, OK 74102
Telephone: (918) 583-3611

Subscribed and sworn to before me this 17th day of July, 1975.

/s/ Sharyn Manning
Notary Public

(SEAL)

My Commission expires: 2-5-78

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY a corporation v. FRANK SEAY, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma	No. 48,708 No. 48,709

ORDER

For good cause this Court stays all future hearings or other actions by the Honorable Frank Seay, District Judge of Hughes County, Oklahoma, until the further order of this Court.

STAY GRANTED

DONE IN CONFERENCE this 21st day of July, 1975.

/s/ Ben T. Williams
Chief Justice

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY a corporation Petitioner vs. FRANK SEAY, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma Respondent	Supreme Ct. No. 48708 District Ct. No. C-74-250

MOTION TO DENY APPLICATION
TO ASSUME ORIGINAL JURISDICTION
AND MOTION TO DISMISS PETITION
FOR WRIT OF PROHIBITION

COMES NOW Maxwell Darks by and through his attorneys and moves this honorable court to deny Petitioner's Application to Assume Original Jurisdiction, and issue a Writ of Prohibition directed to the Respondent herein, Frank Seay, the Honorable Judge of the District Court of the Twenty-Second Judicial District, County of Hughes, State of Oklahoma, and further moves this honorable court to dismiss the Petition for Writ of Prohibition filed herein by the Petitioner, for the following reasons:

I

The subject matter of this cause is not related to the subject matter of the Hughes County District Court cases, No.'s C-73-93 through C-73-102 (of which Maxwell Darks, individually, is a party in cases C-73-93, C-73-94, C-73-95, and C-73-100) all as previously admitted in open court by Petitioner.

II

That the alleged acts of trespass in this cause are in no way related to the allegation and averments of Petitioner in its Petition for Writ of Prohibition.

III

Petitioner seeks in its Petition and Application to Assume Jurisdiction affirmative relief which, under the set of facts therein alleged, this honorable court cannot grant by the extraordinary Writ of Prohibition.

IV

That Petitioner has an adequate remedy at law through the procedures prescribed by the Statutes of the State of Oklahoma whereby his rights will be protected and all of the issues raised by Petitioner in its Petition and Application to Assume Jurisdiction may be determined if applicable.

WHEREFORE, Maxwell Darks, for himself and on behalf of the Respondent, Frank Seay, the Honorable Judge of the District Court of the Twenty-Second Judicial District, County of Hughes, State of Oklahoma, pray this court to enter its Order denying Application to Assume Jurisdiction and dismissing the Petition for Writ of Prohibition filed herein.

/s/ Robert G. Grove
Robert G. Grove

/s/ Carl Michael Smith
Carl Michael Smith

324 North Robinson, Suite 300
Oklahoma City, Oklahoma 73102
Attorneys for Maxwell Darks

CERTIFICATE OF MAILING

I, Carl Michael Smith, attorney for Maxwell Darks, do hereby certify that I have this 28th day of July,

1975, mailed a true and correct copy of the above and foregoing Motion to Deny Application to Assume Original Jurisdiction and Motion to Dismiss Petition for Writ of Prohibition to:

Mr. Robert Lawrence & Mr. Charles Crane
P. O. Box 201
Tulsa, Oklahoma 74102

Honorable Frank Seay
District Judge
Hughes County Courthouse
Holdenville, Oklahoma 74848

/s/ Carl Michael Smith
Carl Michael Smith

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY a corporation Petitioner vs. FRANK SEAY, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma Respondent	Supreme Ct. No. 48709 District Ct. No. C-74-251

MOTION TO DENY APPLICATION
TO ASSUME ORIGINAL JURISDICTION
AND MOTION TO DISMISS PETITION
FOR WRIT OF PROHIBITION

COMES NOW Maxwell Darks and Les Starks d/b/a Greasy Creek Cattle Company by and through its attorneys and moves this honorable court to deny Petitioner's Application to Assume Original Jurisdiction, and issue a Writ of Prohibition direction to the Respondent herein, Frank Seay, the Honorable Judge of the District Court of the Twenty-Second Judicial District, County of Hughes, State of Oklahoma, and further moves this honorable court to dismiss the Petition for Writ of Prohibition filed herein by the Petitioner, for the following reasons:

I

The Petition shows on its face that the allegations and averments therein contained do not pertain to the partnership entity of Maxwell Darks and Les Starks, d/b/a Greasy Creek Cattle Company.

II

That the alleged acts of trespass in this cause are in no way related to the allegations and averments of Petitioner, in its Petition for Writ of Prohibition.

III

Petitioner seeks in its Petition and Application to Assume Jurisdiction affirmative relief which, under the set of facts therein alleged, this honorable court cannot grant by the extraordinary Writ of Prohibition.

IV

That Petitioner has an adequate remedy at law through the procedures prescribed by the Statutes of the State of Oklahoma whereby its rights will be protected and all of the issues raised by Petitioner in its Petition and Application to Assume Jurisdiction may be determined if applicable.

WHEREFORE, Maxwell Darks and Les Starks, d/b/a Greasy Creek Cattle Company for itself and on behalf of the Respondent, Frank Seay, the Honorable Judge of the District Court of the Twenty-Second Judicial District, County of Hughes, State of Oklahoma, pray this court to enter its Order denying Application to Assume Jurisdiction and dismissing the Petition for Writ of Prohibition filed herein.

/s/ Robert G. Grove
Robert G. Grove

/s/ Carl Michael Smith
Carl Michael Smith

324 North Robinson, Suite 300
Oklahoma City, Oklahoma 73102
Attorneys for Maxwell Darks
and Les Starks d/b/a Greasy
Creek Cattle Company

CERTIFICATE OF MAILING

I, Carl Michael Smith, attorney for Maxwell Darks and Les Starks, d/b/a Greasy Creek Cattle Company, do hereby certify that I have this 28th day of July, 1975, mailed a true and correct copy of the above and foregoing Motion to Deny Application to Assume Original Jurisdiction and Motion to Dismiss Petition for Writ of Prohibition to:

Mr. Robert Lawrence & Mr. Charles Crane
P. O. Box 201
Tulsa, Oklahoma 74102

Honorable Frank Seay
District Judge
Hughes County Courthouse
Holdenville, Oklahoma 74848

/s/ Carl Michael Smith
Carl Michael Smith

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, a corporation
Petitioner
vs.
FRANK SEAY, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma
Respondent

Supreme Ct. No. 48708
District Ct. No. C-74-250

BRIEF IN SUPPORT
OF MOTION TO DENY APPLICATION
TO ASSUME ORIGINAL JURISDICTION
AND MOTION TO DISMISS PETITION
FOR WRIT OF PROHIBITION

STATEMENT OF THE CASE

On November 26, 1974, Maxwell Darks filed a trespass action in the District Court of Hughes County, State of Oklahoma, Number C-74-250, as a result of a trespass by the Defendant therein, and Petitioner herein, Transok Pipe Line Company. The essential allegations of said Petition were to the effect that Defendant, by and through its duly authorized agents, trespassed upon the lands of Plaintiff at various times during the months of April and May, 1973. The Petition further alleged that the Defendant filed a series of condemnation actions in the District Court of Hughes County, State of Oklahoma, No.s C-73-93 through C-73-102; that in accord with the report of commissioners in those condemnation cases, the Petitioner herein deposited a sum of money awarded to the Plaintiff, Maxwell Darks, on or about the 25th

day of June, 1973. However, that due to the acts of Petitioner, Plaintiff, Maxwell Darks, was unable to withdraw the sum of money awarded by the commissioners until December 13, 1974. Plaintiff, Maxwell Darks, further alleged acts of trespass by the Defendant and Petitioner in that it caused foreign natural gas to be injected into the lands of Plaintiff.

On January 24, 1975, Defendant and Petitioner filed its Demurrer to Plaintiff's Petition on the grounds that the Petition does not state a cause of action against the Defendant, and that there was another action pending between the parties. Plaintiff thereafter amended his Petition, and the Demurrer as to Plaintiff's Amended Petition was heard by the trial court on the 19th day of June, 1975. The Honorable Frank Seay, Judge of the District Court of Hughes County, overruled Defendant and Petitioner's Demurrer and allowed exceptions to said ruling. The trial court's ruling was based at least in part on Defendant and Petitioner's successful argument to the trial court in the condemnation cases that elements of damage for trespass were not proper in a condemnation suit, and if such trespass took place, a separate action at law would have to be filed. (Pages 43-44, Transcript of proceedings, Case No.s C-73-93, C-73-94, and C-73-95; Supreme Court No.s 48,054, 48,055, and 48,056). The trial court agreed with Defendant and Petitioner's earlier argument, and in overruling the Demurrer sustained that argument (pages 10-14, Transcript of Proceedings on Demurrer.)

ARGUMENT AND AUTHORITY

Proposition I

RESPONDENT WAS CORRECT IN OVERRULING PETITIONER'S DEMURRER

Petitioner makes no argument that the allegations

and averments contained in Plaintiff's Petition are insufficient to state a cause of action. Rather, Petitioner bottoms its argument that the Respondent should have sustained its Demurrer to Plaintiff's Amended Petition based on the fact that there is another action pending between the parties in which Plaintiff can be afforded full and complete relief. Petitioner cites the condemnation suits in Hughes County District Court, No.s C-73-93 through C-73-102 (of which Maxwell Darks, individually, is a party in cases C-73-93, C-73-94, C-73-95 and C-73-100). Petitioner, however, neglects to advise this honorable court that it successfully argued that the cause of action herein alleged was not properly maintainable in these various condemnation suits, and if said trespass did in fact occur, this Plaintiff would have an adequate remedy at law through a separate trespass action. Plaintiff merely took Petitioner's advice, and filed this action following the trial court's ruling in the condemnation cases to that same effect. In addition, Plaintiff maintains that his Amended Petition in this cause clearly states two separate and distinct causes of action for trespass against the Defendant and Petitioner, even though same are not separately denoted as such. First, Paragraphs II, III, and IV refer to actual trespass on the surface of the land prior to Defendant and Petitioner posting any award by commissioners on June 25, 1973. *Article 2, § 24 of the Oklahoma Constitution* states, in part, as follows:

> "Until the compensation shall be paid to the owner, or into court for the owner, the property shall not be disturbed, or the proprietary rights of the owner divested. When possession is taken of property condemned for any public use, the owner shall be entitled to the immediate receipt of the compensation awarded, . . ."

Plaintiff maintains that any entry upon his land by Defendant and Petitioner before the critical date of June 25, 1973, amounts to a trespass actionable at law. To further compound the situation, the Defendant and Petitioner deliberately posted the commissioners' award on June 25, 1973, in such a manner that Plaintiff was unable to obtain the "immediate receipt" of said award and was in fact unable to withdraw the award until the trial court ordered same withdrawn on December 13, 1974, based upon Plaintiff's own efforts in determining what portion of the total sum deposited belonged to him in relation to the sums belonging to other Defendants. Plaintiff further alleges in Paragraph V of his Amended Petition that during this period, the Defendant and Petitioner unlawfully, maliciously and wrongfully injected foreign gas into the lands of the Plaintiff resulting in a further trespass.

The Defendant and Petitioner in its Brief in Support of Petition for Writ of Prohibition cites numerous Oklahoma cases which it maintains stand for the proposition that damages for trespass by a condemnor are recoverable only in the condemnation proceeding itself and that the usual remedies in tort are not available. However, without exception, the cases cited by Defendant and Petitioner are all distinguishable on their facts from the case at bar. The case of *Graham v. City of Duncan, 354 P.2d 458 (Okl. 1960)* involved the loss of a growing crop by a condemnee during the lawful operation by condemnor on the condemned property following payment of the commissioners' award to condemnee, and trespass was not an issue. In *Delhi Gas Pipe Line Corporation v. Swanson, 520 P.2d 670 (Okl. 1974)* trespass was an issue, however, it appears that the condemnor was on the property with the landowner's permission, and that the issue between the parties was the fact that

the condemnor took possession of a strip 210 feet wide rather than a mere 50 feet wide as prayed for in its Petition. In the instant case, Plaintiff is not maintaining that the trespass is a result of any "possession" by the Defendant and Petitioner, but was the result of several unlawful entries. Further, acts of trespass occurring prior to the payment of the commissioners' award apparently was not an issue as it is in the instant action. The cases of *Stedman v. State Highway Commission, 174 Okl. 308, 50 P.2d 657*, and *State of Oklahoma v. Adams, 105 P.2d 416 (Okl. 1940)*, do not involve trespass as an issue and the damages complained of occurred not only after the commissioners award had been paid, but following a trial on the merits. *City Service Gas Company v. Huebner, 197 P.2d 985 (Okl. 1948)* involved alleged trespass occurring during the normal operation of putting in the condemnor's gas pipe line on the condemned property and the disturbance of the property prior to the commissioners' award being paid was not an issue. The case of *Oklahoma City v. Wells, 91 P.2d 1077 (Okl. 1939)* did not involve trespass as an issue, and the case of *Morton v. Okmulgee Producers and Manufacturers Gas Company, 248 P.2d 1028 (Okl. 1952)* involved an issue relating to title over the condemnor's property allegedly wrongfully placed on condemnee's property.

The issues in the instant case involve an alleged intentional trespass by a condemnor (Defendant and Petitioner) resulting in a direct violation of *Article 2, § 24 of the Oklahoma Constitution.*

Proposition II

PETITIONER HAS AN ADEQUATE REMEDY AT LAW AND EXTRAORDINARY WRIT OF PROHIBITION SHOULD NOT ISSUE

Petitioner is seeking to use the superintending con-

trol of this honorable court to prevent Plaintiff from seeking a redress of his damages through his day in court. The District Court of Hughes County, State of Oklahoma, clearly has jurisdiction over the subject matter and parties of this cause. Petitioner's only complaint is that there is, allegedly, another action pending between the parties as to this same subject matter. The use of the extraordinary Writ of Prohibition by this honorable court is only exercised to prevent an inferior judicial tribunal (such as a district court) from exercising jurisdiction which it does not possess, or from exceeding jurisdiction conferred. *Kirk v. Coryell, 419 P.2d 555 (Okl. 1966); Creighton v. District Court, etc., 359 P.2d 581 (Okl. 1961).* Here, the District Court of Hughes County does have jurisdiction and has not in any way exceeded or abused that jurisdiction, and the extraordinary Writ of Prohibition should not lie, as the Petitioner has its adequate legal remedy, if any, through the trial of the case, and appeal if necessary.

CONCLUSION

In conclusion, Plaintiff, Maxwell Darks, maintains that the trespass involved in the case at bar is a complete and distinct subject matter from the subject matter of the condemnation suits pending between these parties and, therefore, Plaintiff respectfully maintains that the Application to Assume Original Jurisdiction and Petition for Writ of Prohibition should be denied, and that the cause be remanded to the trial court for further proceedings.

Respectfully submitted,

/s/ Robert G. Grove
Robert G. Grove

/s/ Carl Michael Smith
Carl Michael Smith

324 North Robinson, Suite 300
Oklahoma City, Oklahoma 73102
Attorneys for Maxwell Darks

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY
a corporation
Petitioner

vs

FRANK SEAY, the Honorable Judge
of the District Court of the
22nd Judicial District, County
of Hughes, State of Oklahoma
Respondent

Supreme Ct.
No. 48709

District Ct.
No. C-74-251

BRIEF IN SUPPORT
OF MOTION TO DENY APPLICATION
TO ASSUME ORIGINAL JURISDICTION
AND MOTION TO DISMISS PETITION
FOR WRIT OF PROHIBITION

STATEMENT OF THE CASE

On November 26, 1974, Maxwell Darks and Les Starks, d/b/a Greasy Creek Cattle Company, filed a trespass action in the District Court of Hughes County, State of Oklahoma, No. C-74-251, as a result of a trespass by the Defendant therein and Petitioner herein, Transok Pipe Line Company. Defendant and Petitioner on the 24th day of January, 1975, filed its Demurrer to Plaintiff's Petition on the grounds that no cause of action was stated in said Petition and that there was another action pending between the parties. Plaintiff thereafter amended its Petition, and the Demurrer as to Plaintiff's Amended Petition was heard by the trial court on the 19th day of June, 1975. The Honorable Frank Seay, Judge of the District Court of Hughes County, overruled Defendant and Petitioner's Demurrer and allowed exceptions to said ruling.

ARGUMENT AND AUTHORITY

Proposition I

RESPONDENT WAS CORRECT IN OVERRULING PETITIONER'S DEMURRER

Petitioner makes no argument that the allegations and averments contained in Plaintiff's Petition are insufficient to state a cause of action. Rather, Petitioner bottoms its argument that the Respondent should have sustained its Demurrer to Plaintiff's Amended Petition based on the fact that there is another action pending between the parties, in which Plaintiff can be afforded full and complete relief. Petitioner cites the condemnation suits in Hughes County District Court, No.'s C-73-93 through C-73-102 (of which Maxwell Darks, individually, is a party in Cases C-73-93, C-73-94, C-73-95, and C-73-100). Plaintiff in this cause, however, is an Oklahoma partnership, and the cases referred to involve one of the partners in his individual capacity only. There is no allegation in either Petitioner's Petition or Brief in Support thereof or Application to Assume Original Jurisdiction that the Plaintiff in this law suit is in any way involved in any other law suit with the Petitioner concerning this or any other subject matter. Petitioner seems to propose that the fact that one of the partners is involved as a party defendant in the condemnation suits somehow gives the trial court jurisdiction over the Plaintiff. There is no question that a partnership is a legal entity, separate and apart from the individual partners who compose it. *C. H. Leavell and Company v. Oklahoma Tax Commission, 450 P. 2d 211 (Okl. 1968); Layman v. Readers Digest Association, 412 P.2d 192 (Okl. 1965).*

12 O. S. § 267 states as follows:

"The Defendant may demur to the Petition only when it appears on its face, either:

> Third. That there is another action pending between the same parties for the same cause."

This Statute requires that the pendency of another action *between the same parties* for the same cause is ground for demur only when *apparent on the face of the Petition. Dean v. Storm, 47 Okl. 358, 148 P. 732 (1915).*

Defendant and Petitioner has in no way taken any property of this Plaintiff in condemnation either by suit or otherwise, and the damage this Plaintiff has suffered, if any, is properly before the District Court of Hughes County in the form of a trespass action seeking the recovery of money damages. The Supreme Court of Oklahoma held in *Benke v. Stepp, 184 P.2d 615, 199 Okl. 119 (1947)* as follows:

> "Injuries resulting from negligence or trespass, in their most comprehensive signification, include an action in form of tort arising from the fault of Defendants. Albert's Ex'x v. Blue, 49 Ky 92; Vol. 42 Word and Phrases, Perm. Ed., page 476."

Proposition II

PETITIONER HAS AN ADEQUATE REMEDY AT LAW AND THE EXTRAORDINARY WRIT OF PROHIBITION SHOULD NOT ISSUE.

Petitioner is attempting to use the superintending control of this honorable court to prevent Plaintiff from seeking a redress of its damages through its day in court. The District Court of Hughes County, Oklahoma, clearly has jurisdiction over the subject matter and parties of this cause. Petitioner's only complaint is that there is, allegedly, another action pending between the parties as to this same subject matter. The use of the extraordinary Writ of Prohibition by this honorable court is only exercised to prevent an inferior judicial tribunal (such as a district court) from exercising jurisdiction

which it does not possess, or from exceeding jurisdiction conferred. *Kirk v. Coryell, 419 P. 2d 555 (Okl. 1966); Creighton v. District Court, etc., 359 P.2d 581 (Okl. 1961).* Here, the District Court of Hughes County does have jurisdiction and has not in any way exceeded or abused that jurisdiction, and the extraordinary Writ of Prohibition should not lie, as the Petitioner has its adequate legal remedy, if any, through the trial of the case, and appeal, if necessary.

Conclusion

In conclusion, Plaintiff Maxwell Darks and Les Starks, d/b/a Greasy Creek Cattle Company, maintains that it is a stranger to the condemnation suits referred to above by the Petitioner and, therefore, those suits could in no way be considered another action pending as to this Plaintiff. Therefore, Plaintiff respectfully maintains that the Application to Assume Original Jurisdiction and Petition for Writ of Prohibition be denied, and that the cause be remanded to the trial court for further proceedings.

Respectfully submitted,

/s/ Robert G. Grove
Robert G. Grove

/s/ Carl Michael Smith
Carl Michael Smith

324 North Robinson, Suite 300
Oklahoma City, Oklahoma 73102

Attorneys for Maxwell Darks
and Les Starks, d/b/a Greasy
Creek Cattle Company

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, a corporation,
Petitioner,
vs.
FRANK SEAY, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma,
Respondent.

Supreme Court No. 48708
District Court No. C-74-250

MEMORANDUM BRIEF

Comes now the Petitioner, pursuant to the invitation of Justice Doolin, apprizing the Court, in the case at bar, as to the significance of the Court's ruling in the case of *Russell vs. McGinn*, 514 P2d 658 (1973). Before analyzing the *Russell* decision, a brief synopsis of the parties' briefs and arguments might be useful.

I.
ARGUMENT OF MAXWELL DARKS

It is the contention of Maxwell Darks (hereinafter referred to as Condemnee) that the Demurrer of the Petitioner in the Hughes County trespass action was a 12 O.S. 1910, Section 267 (3) Demurrer, that is, that another action was pending between the parties for the same cause. The Condemnee further alleges that the Petitioner once "suggested," in argument, that the Condemnee bring a trespass action against the Petitioner. Condemnee also states that OKLA. CONST., art. 2 § 24 was violated because the Petitioner supposedly posted the Commissioners Award in the condemnation suits in such a manner that the Condemnee was denied immediate receipt thereof. Petitioner concludes that the Demurrer was properly overruled by the Respondent, Judge Seay, since the subject matter of the trespass action was different from the subject matter of the Hughes County condemnation suits.

II.
ARGUMENT OF TRANSOK PIPE LINE COMPANY

Said Demurrer of the Petitioner was, in fact, a 12 O.S. 1910, Section 267 (6) Demurrer, that is, that the damaged party had failed to state a cause of action. Petitioner admits that had Transok failed to file the Hughes County condemnation suits, then the Condemnee would have been free to file his own action in inverse condemnation. This is not to say that Petitioner ever suggested that the Condemnee file a trespass action. With regard to the supposed violation of OKLA. CONST. art. 2, § 24, Petitioners sole duty with regard to the posting of the Commissioners Award was to pay the money into Court. 66 O.S. 1972, § 53 and OKLA. CONST. art. 2, §24. Petitioner fulfilled its duty by paying the money into court. If the Court Clerk failed to promptly pay the money out of Court, Condemnee's redress was a Writ of Mandamus directed to the Court Clerk; however, this will not give rise to a trespass action against the Condemnor. Finally, the damages alleged in the trespass action will be decided in the Hughes County condemnation suits. Under Oklahoma law, all damages sustained by any party incident to a condemnor's actions, including damages resulting from negligence or *trespass*, are recoverable *only* in a condemnation proceeding. *Delhi Gas Pipeline Corp. vs. Swanson*, 520 P2d 670 (1974), and

Oklahoma City vs. Wells, 91 P2d 1077 (1939). A Condemnee does not have a cause of action in trespass, as a multiplicity of suits would result, and the threat of a double recovery for the Condemnee would exist — one recovery in the trespass action and another recovery in a condemnation action. See *Cities Service Gas Co. vs. Huebner*, 197 P2d 985 (1948). Condemnation is the Condemnee's *exclusive* and *sole* remedy.

III.
FIRST PROPOSITION

THE *RUSSELL VS. McGINN* DECISION IS RELEVANT TO THE CASE AT BAR

In 1973, the Oklahoma Supreme Court decided the case of *Russell vs. McGinn*, 514 P2d 658 (1973). The Oklahoma Supreme Court held in *Russell* that the Judge of the District Court of Beckham County would be prohibited from proceeding further in a probate action, since the District Court of Grady County was the first to acquire and exercise jurisdiction over the issues involved. The Court stated at 514 P2d, pg. 661, "Under the facts presented, there is no substantial reason why this case should not be disposed of in its *entirety* in Grady County. The District Court of Grady County first acquired and has jurisdiction to settle *all* issues." [Emphasis added.]

The pending Hughes County condemnation suits will be heard by the Honorable Rudolph Hargrave, sitting as a Judge of the District Court of Hughes County. The Hughes County trespass action has been assigned to Judge Frank Seay, Respondent herein. Both the condemnation suits and the trespass case are within the jurisdiction of the Hughes County District Court. The

ruling in the *Russell* case is significant; in that, the Court stated in *Russell* that the District Court first acquiring jurisdiction should dispose of *all* issues, in their *entirety*. The policy underlying the Courts decision was obviously the desire to avoid a multiplicity of suits. In the case at bar, there is no reason why the condemnation suits should not dispose of all damage claims arising out of the condemnor's actions, since the Condemnee has sought affirmative relief by demanding a jury trial in the condemnation suits and Judge Hargrave has general jurisdiction over the determination of the damages issue and the parties.

The *Russell* decision is important, because a conflict may develop between the two Hughes County District Court Judges, as the damaged party is seeking to obtain a recovery in both suits for the same acts of the Condemnor allegedly resulting in the same damages. The issue of damages incident to the Condemnor's actions must be decided in one action; otherwise, the objective of the condemnation statutes, the conclusive determination of the rights and obligations of all parties, would be frustrated.

IV.
CONCLUSION

Pursuant to the argument and authority cited by the Petitioner, a Writ of Prohibition should be issued prohibiting Judge Seay from continuing with the Hughes County trespass action and, thereby, exercising unauthorized judicial power.

THEREFORE, pursuant to the law and the facts of the case at bar, Petitioner respectfully requests that this

Honorable Court issue its Writ of Prohibition as prayed for.

Respectfully submitted,
TRANSOK PIPE LINE COMPANY
BY /s/ Robert L. Lawrence
Robert L. Lawrence
/s/ Charles B. Crane
Charles B. Crane
/s/ Kevin M. Abel
Kevin M. Abel
Attorneys for Petitioner

P. O. Box 201
Tulsa, OK 74102
PH: 583-3611

CERTIFICATE OF SERVICE

I, Kevin M. Abel, hereby certify that I sent a true and correct copy of the above and foregoing Memorandum brief to each of the parties involved herein, on this 8th day of August, 1975.

/s/ Kevin M. Abel
Kevin M. Abel

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, a corporation, Petitioner, vs. FRANK SEAY, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Respondent.	Supreme Court No. 48709 District Court No. C-74-251

MEMORANDUM BRIEF

Comes now the Petitioner, pursuant to the invitation of Justice Doolin, apprizing the Court, in the case at bar, as to the significance of the Court's ruling in the case of *Russell v. McGinn*, 514 P2d 658 (1973). Before analyzing the *Russell* decision, a brief synopsis of the parties' briefs and arguments might be useful.

I.
ARGUMENT OF MAXWELL DARKS
AND LES STARKS d/b/a
GREASY CREEK CATTLE COMPANY

It is the contention of Maxwell Darks and Les Starks, d/b/a Greasy Creek Cattle Company (hereinafter referred to as Condemnee) that the Demurrer of the Petitioner in the Hughes County trespass action was a 12 O.S. 1910, Section 267 (3) Demurrer, that is, that another action was pending between the parties for the same cause. The Condemnee argues that it is a partnership, the Greasy Creek Cattle Company, which raises Santa

Gertrudis cattle. The damaged party, the alleged partnership, argues that a "condemnee" can only be defined as a party joined in a condemnation suit. The alleged partnership concludes that the Demurrer was properly overruled by the Respondent, Judge Seay, since the partnership was not involved in and is a stranger to the pending Hughes County condemnation suits.

II.
ARGUMENT OF TRANSOK PIPE LINE COMPANY

Said Demurrer of the Petitioner was, in fact, a 12 O.S. 1910, Section 267 (6) Demurrer, that is, that the damaged party had failed to state a cause of action. Under Oklahoma law, all damages sustained by any party incident to a condemnor's actions, including damages resulting from negligence or trespass, are recoverable only in a condemnation proceeding. A "condemnee" is any property owner damaged by a condemnor's actions; the term "property" as used in OKLA. CONST. art 2, § 24, includes not only real estate held in fee, but also personal property. *Graham vs. City of Duncan*, 354 P2d 458 (1960). Condemnation is a condemnee's *exclusive* and *sole* remedy. *Delhi Gas Pipeline Corp. vs. Swanson*, 520 P2d 670 (1974), and *Oklahoma City vs. Wells*, 91 P2d 1077 (1930). A damaged party does not have a cause of action in trespass, as a multiplicity of suits would result, and the threat of a double recovery for the damaged party would exist—one recovery in the trespass action and another recovery in the condemnation action. See *Cities Service Gas Co. vs. Huebner*, 197 P2d 985 (1948). Petitioner challenges condemnees' contention that the cutting of fences and the entry onto and the taking of possession of Darks real estate constitutes a trespass to animals grazing thereon.

Assuming, arguendo, the existence of the partnership, the partnership is a tenant, and the tenants exclusive and sole remedy for its damages incident to the Condemnor's actions is in the pending condemnation jury trials. *Graham vs. City of Duncan, supra.* If a tenant is to obtain a recovery for his damages, he must intervene in a condemnation action, or if no condemnation action has been filed, his remedy is inverse condemnation.

III.
FIRST PROPOSITION
THE *RUSSELL VS. McGINN* DECISION IS RELEVANT TO THE CASE AT BAR

In 1973, the Oklahoma Supreme Court decided the case of *Russell vs. McGinn*, 514 P2d 658 (1973). The Oklahoma Supreme Court held in *Russell* that the Judge of the District Court of Beckham County would be prohibited from proceeding further in a probate action, since the District Court of Grady County was the first to acquire and exercise jurisdiction over the issues involved. The Court stated at 514 P2d, pg. 661, "Under the facts presented, there is no substantial reason why this case should not be disposed of in its *entirety* in Grady County. The District Court of Grady County first acquired and has jurisdiction to settle *all* issues." [Emphasis added.]

The pending Hughes County condemnation suits will be heard by the Honorable Rudolph Hargrave, sitting as judge of the District Court of Hughes County. The Hughes County trespass action has been assigned to Judge Frank Seay, Respondent herein. Both the condemnation suits and the trespass case are within the jurisdiction of the Hughes County District Court. The ruling in the *Russell* case is significant; in that, the Court stated in *Russell* that the District Court first acquiring

jurisdiction should dispose of *all* issues, in their *entirety*. The policy underlying the Courts decision was obviously the desire to avoid a multiplicity of suits. In the case at bar, there is no reason why the condemnation suits should not dispose of all damage claims arising out of the condemnor's actions, since the partner Maxwell Darks has sought affirmative relief by demanding a jury trial (and by raising the cattle damage issue) in the condemnation suits and Judge Hargrave has general jurisdiction over the determination of the damages issue and the parties.

The Russell decision is important, because a conflict may develop between the two Hughes County District Court Judges, as the damaged party is seeking to obtain a recovery in both suits for the same acts of the Condemnor allegedly resulting in the same damages. The issue of damages incident to the Condemnor's actions must be decided in one action; otherwise, the objective of the condemnation statutes, the conclusive determination of the rights and obligations of all parties, would be frustrated.

IV.
CONCLUSION

Pursuant to the argument and authority cited by the Petitioner, a Writ of Prohibition should be issued prohibiting Judge Seay from continuing with the Hughes County trespass action and, thereby, exercising unauthorized judicial power.

THEREFORE, pursuant to the law and the facts of the case at bar, Petitioner respectfully requests that this Honorable Court issue its Writ of Prohibition as prayed for.

Respectfully submitted,
TRANSOK PIPE LINE COMPANY

By: /s/ Robert L. Lawrence
Robert L. Lawrence

/s/ Charles B. Crane
Charles B. Crane

/s/ Kevin M. Abel
Kevin M. Abel
Attorneys for Petitioner

P. O. Box 201
Tulsa, OK 74102
PH: 583-3611

CERTIFICATE OF SERVICE

I, Kevin M. Able, hereby certify that I sent a true and correct copy of the above and foregoing Memorandum Brief to each of the parties involved herein, on this 9th day of August, 1975.

/s Kevin M. Abel
Kevin M. Abel

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

TRANSOK PIPELINE COMPANY, a corporation,
Petitioner
-vs-
FRANK SEAY, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma
Respondent

Supreme Ct. No. 48708
District Ct. No. C-74-250

REPLY TO MEMORANDUM BRIEF

COMES NOW Maxwell Darks, on behalf of himself and the respondent, and replies to the memorandum brief of the petitioner as follows:

I

Maxwell Darks, would invite this court's attention to the language of Petitioner's Demurrer before the trial court and the transcript of argument before that court and the brief and arguments of Petitioner before this court, all in substance, arguing that the respondent should be prohibited from jurisdiction over this matter due to *another action pending*.

II

The amended petition of Maxwell Darks clearly alleges that a trespass took place well prior to the date the condemnor deposited funds for the condemnee as awarded by the report of commissioners (June 25, 1973). Article II, Section 24 of the Oklahoma Constitution was

clearly violated by the petitioner with particular regard to the following language:

> "Until the compensation shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights divested."

Again, none of the cases cited by Petitioner with regard to the question of a condemnee's remedy for damages caused by trespass of a condemnor occurred prior to the payment of the Commissioner's award and none involved a construction of the above quoted constitutional language. Petitioner's suggestion that Plaintiff's action for trespass be joined in the condemnation suits give rise to at least two additional problems.

(1) Will Plaintiff be required to assert his damages in all of the condemnation suits in which he is a party (Hughes County District Court Nos. C-73-93, C-73-94, C-73-95 and C-73-100) and if not all which one?

(2) Will he be allowed to recover punitive damages as provided by 23 O.S., Section 9, as he has alleged a wrongful and malicious entry?

III

The case of *Russell -vs- McGinn 514 p.2d 658, Okl. 1973*, is not applicable to the present action. In *Russell* this Honorable Court was confronted with a question of jurisdiction involving two separate District Courts within the State of Oklahoma. Here, both the trespass action and the condemnation actions are pending in the District Court of Hughes County.

WHEREFORE, premises considered, Plaintiff, Maxwell Darks, respectfully prays that the Petition for Writ of Prohibition be denied by this Honorable Court and

that this cause be remanded to the District Court of Hughes County for trial on its merits.

Respectfully submitted,

ROBERT G. GROVE

By /s/ Carl Michael Smith
Carl Michael Smith
Suite 300
324 North Robinson
Oklahoma City, Oklahoma

Attorneys for Plaintiff
Maxwell Darks

CERTIFICATE OF MAILING

I, Carl Michael Smith, do hereby certify that I have mailed a true and correct copy of the above and foregoing Reply to Memorandum Brief to Charles B. Crane, Attorney at Law, P. O. Box 201, Tulsa, Oklahoma, 73102 and The Honorable Frank Seay, District Judge, Hughes County Courthouse, Holdenville, Oklahoma 74848, on this 11th day of August, 1975.

/s/ Carl Michael Smith
Carl Michael Smith

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, a corporation, Petitioner vs. FRANK SEAY, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma Respondent	Supreme Ct. #48,709 District Ct. #C-74-251

REPLY TO MEMORANDUM BRIEF

COME NOW Maxwell Darks and Les Starks d/b/a Greasy Creek Cattle Company, on behalf of itself and the respondent, and replies to the memorandum brief of the petitioner as follows:

I

Maxwell Darks and Les Starks d/b/a Greasy Creek Cattle Company would invite this court's attention to the language of petitioner's Demurrer before the trial court and the transcript of argument before that court and the brief and arguments of petitioner before this court, all, in substance, arguing that the respondent should be prohibited from jurisdiction over this matter due to *another action pending*.

II

This trespass action being maintained by Maxwell Darks and Les Starks d/b/a Greasy Creek Cattle Company is not seeking "double recovery" as asserted by petitioner. This is the only action ever instituted concerning

these two parties, and the amended petition clearly shows only a single recovery (money damages) is being sought. This plaintiff is a tenant on real property only a *portion* of which is being condemned. Condemnation has never been sought by petitioner against any real or personal property owned by the cattle partnership. The case of *Graham v. City of Duncan, 354 P.2d 458 (Okla. 1960)* involved a tenant who was a *party defendant* in the condemnation action and held, quite properly, that his failure to put on evidence of his damages during the condemnation trial constituted res judicata. Petitioner asserts that the cattle partnership "must intervene" in the condemnation suits it has filed in Hughes County without citing any authority requiring such intervention and offering no suggestion as to (1) which, if any, or all, of the 10 suits (Hughes County District Court Case Nos. C-73-93 through C-73-102) it should intervene, (2) its position as to the award of punitive damages therein, if the facts show the cattle partnership to be entitled to same, or (3) how the issues would be joined in a condemnation action which allows only a petition, exceptions to commissioner's report and demand for jury trial to be filed. *Board of County Commissioners of Creek County v. Casteel, 522 P.2d 608 (Okla., 1974).* Inverse condemnation would not be the remedy as petitioner has neither brought condemnation action nor taken any part of the cattle partnership's property for public use. *Chandler v. Oklahoma Turnpike Authority, 271 P.2d 374 (Okla., 1954); Elk City v. Rice, 286 P.2d 275 (Okla. 1955);* See also *66 O.S. § 57.* Both *Chandler* and *Elk City* indicate that the common law tort action presently before the court is the proper remedy.

III

The case of *Russell vs. McGinn 514 P.2d 658, Okla. 1973*, is not applicable to the present action. In *Russell*

this Honorable Court was confronted with a question of jurisdiction involving two separate District Courts within the State of Oklahoma. Here, both the trespass action and the condemnation actions are pending in the District Court of Hughes County.

WHEREFORE, premises considered, Plaintiff, Maxwell Darks and Les Starks d/b/a Greasy Creek Cattle Company respectfully prays that the Petition for Writ of Prohibition be denied by this Honorable Court and that this cause be remanded to the District Court of Hughes County for trial on its merits.

Respectfully Submitted,

ROBERT G. GROVE

by /s/ Carl Michael Smith
CARL MICHAEL SMITH
324 N. Robinson, Suite 300
Oklahoma City, Oklahoma 73102

Attorneys for Plaintiff
Maxwell Darks and Les Starks
d/b/a Greasy Creek Cattle
Cattle Company

CERTIFICATE OF MAILING

I, Carl Michael Smith, do hereby certify that I have mailed a true and correct copy of the above and foregoing Reply to Memorandum Brief to Charles B. Crane, Attorney at Law, P.O. Box 201, Tulsa, Oklahoma, 73102 and the Honorable Frank Seay, District Judge, Hughes County, Courthouse, Holdenville, Oklahoma 74848, on this 11th day of August, 1975.

/s/ Carl Michael Smith
Carl Michael Smith

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

Transok Pipe Line Company, a corporation, Petitioner vs. Frank Seay, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Respondent.	No.'s 48,708 & 48,709

ORDER

This matter comes on for hearing upon petitioners' application and petition for Writ of Prohibition against the Hon. Frank Seay, Respondent, seeking to prohibit said District Judge from further proceedings in causes No. C-74-250 & 251 pending in Hughes County, Oklahoma.

It further appearing to this Court that such last mentioned causes of action were filed by the owner of lands sought to be condemned and his alleged partner against the petitioner herein and that they sound in tort (trespass) and seek damages against the real premises and personalty located thereon.

This Court being fully advised in the premises, after hearing argument and for good cause shown, finds that petitioner is entitled to Writs of Prohibition against the Respondent, by virtue of our holdings in Delhi Gas Pipe Line Co. vs. Swanson 520 P.2d 670 (1974); Oklahoma City vs. Wells 185 Okl 369, 91 P.2d 1077 (1939); Cities Service Gas Co. vs. Huebner 200 Okl 521, 197 P.2d 985 (1948) and Graham vs. The City of Duncan 354 P.2d 458 (1960).

WRITS GRANTED.

DONE IN CONFERENCE THIS 8th day of September, 1975, under the superintending control granted this Court, Art. VII § 4 of the Oklahoma Constitution.

/s/ Ben T. Williams
Chief Justice

No. 48,708
No. 48,709

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY
Petitioner
-vs-
FRANK SEAY, THE HONORABLE JUDGE OF THE DISTRICT COURT OF THE 22ND JUDICIAL DISTRICT, COUNTY OF HUGHES, STATE OF OKLAHOMA
Respondent

Petition for Rehearing

ROBERT G. GROVE
CARL MICHAEL SMITH
Suite 300
324 North Robinson
Oklahoma City, Oklahoma

Attorneys for Respondent and Maxwell Darks and Maxwell Darks and Les Starks d/b/a Greasy Creek Cattle Company

September, 1975

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, A Corporation Petitioner -vs- FRANK SEAY, THE HONORABLE JUDGE OF THE DISTRICT COURT OF THE 22nd JUDIICAL DISTRICT COUNTY OF HUGHES, STATE OF OKLAHOMA Respondent	No. 48,708 No. 48,709

PETITION FOR REHEARING

COMES NOW Maxwell Darks, and Maxwell Darks and Les Starks d/b/a Greasy Creek Cattle Company on behalf of themselves and the Honorable Frank Seay, Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Respondent herein and respectfully represents to the Court that on the 8th day of September, 1975, an order was entered by this Honorable Court in said cause in which the Respondent herein was prohibited from further proceedings in the causes No. C-74-250 and C-74-251 pending in Hughes County, Oklahoma.

I

That the decision overlooked certain questions decisive of the case, and duly submitted by counsel, to-wit:

(1) That the causes alleged that a trespass occurred giving rise to both causes of action prior to the condemnation suits being filed by the Petitioner and thus in direct violation of the *Oklahoma Constitution, Article 2, Section 24*, which provides that: "Until the compensation shall be paid to the owner or into court, for the owner

the property shall not be disturbed or the proprietary rights of the owner divested."

That the Plaintiffs below in Case No. C-74-251 are not parties to any condemnation suit; that they comprise a partnership which is a legal and separate entity apart from any individual partners who compose it. *C. H. Leavell and Company -vs- Oklahoma Tax Commission, 450 P.2d 211 (Okl., 1968); Layman -vs- Reader's Diegest Association, 412 P.2d 191 (Okl., 1965)*

That although this Honora'ble Court cited its prior decisions indicating that damages for trespass could be recovered by a condemnee in a pending condemnation action, this Honorable Court failed in its order to give any direction to these parties as to which of the many condemnation suits being prosecuted against the Plaintiffs below such damages should be included, and, as to the Plaintiffs below in Case No. C-74-251, as to which action they should join to recover their damages.

(4) This Honorable Court also failed to express its position as to the award of punitive damages upon the trespass, if in fact, the facts show that the Plaintiffs below be entitled to same.

II

This Honorable Court overlooked a decision which is believed to be a controlling decision as to the availability or nonavailability of a condemnation suit or an inverse condemnation suit as a remedy for tort committed upon a landowner whose property had not been taken or sought to be taken by a condemnation action for public use. *Elk City v. Rice, 286 P2d 275 (Okl, 1955).* Respondent respectfully maintains that this decision would control as concerns the cattle partnership in Case No. C-74-251.

III

That oral arguments be allowed on this Petition before this court.

WHEREFORE, Maxwell Darks and Maxwell Darks and Les Starks, d/b/a Greasy Creek Cattle Company on behalf of themselves and the Respondent herein, respectfully pray for a rehearing of said cause; that this cause be remanded to the District Court of Hughes County for a trial on its merits.

Respectfully submitted,

/s/ Carl Michael Smith
ROBERT G. GROVE and
CARL MICHAEL SMITH
Attorneys for Respondent and
Maxwell Darks and Maxwell Darks
and Les Starks d/b/a Greasy
Creek Cattle Company

CERTIFICATE OF MAILING

I, Carl Michael Smith, do hereby certify that I have mailed a true and correct copy of the above and foregoing Petition for Rehearing to Charles B. Crane, Attorney at Law, P.O. Box 201, Tulsa, Oklahoma 74102, and the Honorable Frank Seay, District Judge, Hughes County Courthouse, Holdenville, Oklahoma, on this 16th day of September, 1975.

/s/ Carl Michael Smith
Carl Michael Smith

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY,
Petitioner,
vs.
FRANK SEAY, JUDGE OF THE DISTRICT COURT OF HUGHES COUNTY, OKLAHOMA,
Respondent.

No. 48,708 and No. 48,709

ORDER TO FILE RESPONSE

Petitioner herein, Transok Pipe Line Company, is hereby Ordered to file a Response to the Petition for Rehearing filed herein on or before the 7th of November, 1975.

Dated this 23rd day of October, 1975.

/s/ Ben T. Williams
Chief Justice

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY,
a corporation,
Petitioner,
vs.
FRANK SEAY, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma,
Respondent.

Supreme Court No. 48708 and No. 48709

PETITIONER'S RESPONSE TO
PETITION FOR REHEARING

COMES NOW the Petitioner, pursuant to the Court's ORDER TO FILE RESPONSE, issued on the 23rd day of October, 1975, requiring the Petitioner to file its response to the Respondents' Petition for Rehearing.

STATEMENT OF FACTS

On July 18, 1975, Petitioner filed the above-entitled and numbered original proceedings seeking writs of prohibition against the Honorable Frank Seay, Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, for the reason and upon the grounds that the Respondent's overruling of Petitioner's Demurrer in the following cases was in error:

Maxwell Darks vs. Transok Pipe Line Company, C-74-250, and

Maxwell Darks and Les Starks, d/b/a Greasy Creek Cattle Company, vs. Transok Pipe Line Company, C-74-251.

On July 21, 1975, this Court issued its stay order in the aforementioned Hughes County actions. On July 29, 1975, Carl Michael Smith filed a motion and brief seeking the dismissal of these writ of prohibition actions on behalf of the Plaintiffs in the aforementioned Hughes County trespass actions and the Honorable Frank Seay. On August 5, 1975, a hearing was held by his Honor Justice Doolin, and arguments by the Petitioner and by the Respondent were entertained by the Court. All issues were raised, all issues were discussed, and all issues were considered by the Court at that time. Justice Doolin invited the Petitioner and Respondent to apprise the Court as to the significance of the Court's ruling in the case of *Russell vs. McGinn*, 514 P.2d 658 (1973), and on August 8, 1975, the Petitioner filed its Memorandum Brief reviewing the *Russell* case, and Mr. Carl Michael Smith filed his Reply to said Memorandum Brief on August 11, 1975. On September 8, 1975, the Supreme Court, in conference, under its superintending control and authority, granted a writ of prohibition in both cases, 48708 and 48709. On september 16, 1975, Mr. Carl Michael Smith filed his Petition for Rehearing, and on the 23rd day of October, 1975, this Court ordered the Petitioner to file its response thereto on or before November 7, 1975.

PETITIONER'S RESPONSE

Petitioner asserts that said Petition for Rehearing is inappropriate, that the prayer for a rehearing should be denied, and that the Order of the Court granting the writs of prohibition should remain in full force and effect.

PROPOSITION I

THE COURT DID NOT OVERLOOK DECISIVE QUESTIONS.

It is alleged in the Petition for Rehearing that the

Supreme Court overlooked certain questions decisive of the case which were duly submitted by counsel, to-wit:

(1) that a trespass action is an appropriate remedy for a condemnor's taking prior to the filing of a condemnation suit, pursuant to the provisions of Article II, §24 of the Oklahoma Constitution;

(2) that the alleged partnership, the Greasy Creek Cattle Company, was not a party to any condemnation suit;

(3) the Court in its Order of September 8, 1975, failed to direct the Plaintiffs below to any specific condemnation action now proceeding in which they might appropriately recover their damages; and

(4) the Court " . . . failed to express its position as to the award of punitive damages . . . "

Petitioner will respond to each of the above four points in the order in which they are raised.

(1) Article II, §24, of the Oklahoma Constitution provides in pertinent part, "Until the compensation shall be paid to the owner, or into court for the owner, the property shall not be disturbed, or the property rights of the owner divested." In other words, the condemnor must first pay the just compensation, and only then may he enter upon the land and take so much of the real estate as may be necessary for the condemnor's purposes. Assuming arguendo that the condemnee's land has been taken first and compensation has been paid later in violation of Article II, §24, what is the comdemnee's remedy? Respondents contend that a violation of this constitutional provision gives rise to a cause of action in trespass. However, 66 O.S. 1910, §51, states that a condemnee's land *may be taken*, held, and appropriated for the condemnor's purposes, and 66 O.S. 1971, §53, out-

lines the procedures and the filing of a condemnation suit by the condemnor *or the condemnee*. Furthermore, the cases relied on by the Petitioner and cited by the Court in its Order of September 8, 1975, hold that inverse condemnation is the landowner's sole remedy. In one of those cases, *Delhi Gas Pipeline Corp. vs. Swanson*, 520 P.2d 670 (1974), there was a taking first and just compensation was paid later in a condemnation suit. Respondents can receive just compensation in the pending Hughes County condemnation suits. There is no cause of action in trespass.

(2) Respondents contend that the Greasy Creek Cattle Company is not a party to any condemnation suit at this time. Petitioner doubts the very existence of the alleged partnership.[1] but assuming arguendo that it does exist, its sole remedy for the condemnor's actions is in the pending Hughes County condemnation suits.

In the case of *Graham vs. the City of Duncan*, 354 P.2d 458 (1960), the damaged party was a tenant, which is the very position occupied by the alleged partnership. A tenant, damaged by a condemnor's actions, must raise his damages in a pending condemnation suit. The Demurrers filed in the aforementioned trespass actions were 12 O.S. 1910, §267(6) demurrers, that is, the damaged party had failed to state a cause of action. Said Demurrers were not based on 12 O.S. 1910, §267(3), that is,

[1]The filings of Maxwell Darks in the Hughes County condemnation suits are evidence of the partnership's nonexistence and are attached hereto and made a part hereof, marked "Exhibit A". In the attached pleadings Maxwell Darks is shown to be the owner of the land and the owner of the cattle, and that Mr. Starks is merely the caretaker of the cattle on the Darks' property. It should be noted that the Greasy Creek Cattle Company is never mentioned in these pleadings. The pertinent portions of said pleadings are emphasized for the convenience of the Court.

that there was another action pending between the same parties. The Demurrers were filed on the basis that there simply was no cause of action in trespass, and that a damaged party must seek its recovery in a condemnation proceeding. It is true that the alleged partnership is not a party to any of the condemnation suits, but Maxwell Darks, an alleged partner, had notice of the suits. Having actual notice of the condemnation suits, the alleged partnership must intervene and seek its recovery in said suits.

(3) Respondent contends that the Court, in its Order of September 8, 1975, failed to direct the Respondents to any specific condemnation action in which they might appropriately recover their damages. The Hughes County condemnation suits, now proceeding, can fully adjudicate the condemnee's damages. Maxwell Darks is already a party to said suits, and the alleged partnership must intervene in those suits if it wishes to pursue a recovery. In its Petition, Transok prayed for a writ of prohibition directed to the Judge of the District Court of Hughes County. In its Order of September 8, 1975, the Court ruled on the sole issue of granting or denying the writs. Having granted the writs, Mr. Darks and the alleged partnership can recover their damages in the pending Hughes County actions. The Supreme Court of the State of Oklahoma is not responsible for directing the Respondents in their efforts to recover their damages in said actions.

(4) Respondent contends that the Court failed to express its position as to the prayer for punitive damages in the Hughes County trespass actions. In the case of *Oklahoma City vs. Wells*, 91 P.2d 1077 (1939), the Oklahoma Supreme Court stated, "When the act of the public authorities in entering upon and occupying private

land which they have taken by eminent domain . . . is expressly authorized by a statute . . . , such an act is not in any sense wrongful or *tortious* and cannot be made the basis of an action of trespass or any other action sounding in tort." Exemplary damages are appropriate only in *ex delicto* actions. 23 O.S. 1910, §9. Since a condemnor's actions can never be in any sense tortious, exemplary damages would never lie for a condemnor's acts. Punitive damages are not appropriate in condemnation suits, and a trespass action, with a prayer for punitive damages, fails to state a cause of action in a condemnation setting.

PROPOSITION II

ELK CITY vs. RICE IS NOT A CONTROLLING DECISION

It is alleged in the Petition for Rehearing that the case of *Elk City vs. Rice*, 286 P.2d 275 (1955), is a controlling decision as concerns the alleged cattle partnership in the Hughes County trespass action, No. C-74-251. The *Rice* decision has no bearing whatsoever on the case at bar. In *Rice*, the municipality, Elk City, constructed a water pipeline in 1937 and obtained a pipeline right-of-way easement from the Plaintiff Rice before construction was ever commenced. Six years later in 1943, Elk City built a dike to repair the pipeline, but negligently failed to remove it after the pipeline was repaired. The presence of the dike caused the erosion of Plaintiff's land in 1948, eleven years after the construction of the pipeline. Rice brought suit in inverse condemnation *and* negligence, and was awarded damages under the negligence theory only. The City appealed, but the Supreme Court affirmed the judgment of the trial court. *Rice* did not involve damages incident to an eminent domain taking. In the words of the Court, "Here there has been no

taking or occupancy, without compensation, of any part of the Plaintiff's land for a public use." *Rice* at 277. There was no taking in the Rice case; there was a negligent failure to remove a dike. In the case at bar, the acts by the Petitioner complained of by the Respondents were incident to its eminent domain taking, and the cases relied on by the Petitioner hold that the Petitioner's acts, even negligent acts, that result in damages to a landowner or his tenants, can be recouped only in condemnation or inverse condemnation actions. *Elk City vs. Rice* is not controlling in any way whatosever.

PROPOSITION III

ORAL ARGUMENTS SHOULD NOT BE ALLOWED ON THE PETITION FOR REHEARING.

Respondent's final contention is that oral argument should be allowed on the Petition for Rehearing. On August 5, 1975, the Court heard argument by both parties, and the Respondent discussed every point advanced in the Petition for Rehearing. Additional oral argument by either side would not provide the Court with any new or helpful information in deciding this matter, and Respondent's prayer for oral argument is an imposition upon the Court's time. Respondent's prayer for oral argument on the Petition for Rehearing should be denied.

CONCLUSION

Respondent has totally failed to submit to the Court any argument justifying a rehearing, and Petitioner prays that the Petition for Rehearing should be denied and

that the Order of the Court granting the writs of prohibition should remain in full force and effect.

Respectfully submitted,

TRANSOK PIPE LINE COMPANY

By /s/ Robert L. Lawrence
Robert L. Lawrence

/s/ Charles B. Crane
Charles B. Crane

/s/ Kevin M. Abel
Kevin Abel
Attorneys for petitioner

P.O. Box 201
2932 First National Tower
Tulsa, Oklahoma 74102
Telephone: (918) 583-3611

CERTIFICATE OF SERVICE

I, Kevin M. Abel, hereby certify that on the 3rd day or November, 1975, I mailed a true and correct copy of the above and foregoing Response to Petition for Rehearing to:

Carl Michael Smith, Esquire
324 North Robinson, Suite 300
Oklahoma City, Oklahoma 73102
Attorney for Maxwell Darks and
Maxwell Darks and Les Starks, d/b/a
Greasy Creek Cattle Company, and

The Honorable Frank Seay
Judge of the District Court of
Hughes County
Hughes County Court House
Holdenville, Oklahoma 74848

/s/ Kevin M. Abel
Kevin M. Abel

IN THE DISTRICT COURT IN AND
FOR HUGHES COUNTY, OKLAHOMA

TRANSOK PIPELINE COMPANY, Plaintiff	No. C73-93
-vs-	No. C73-94
MAXWELL DARKS Defendant	No. C73-95

APPLICATION FOR TEMPORARY RESTRAINING ORDER TO ENJOIN TRESPASS AND APPLICATION FOR TEMPORARY INJUNCTION

1. That the defendant, Maxwell Darks, is the owner of the land described in this action, his Fee Ownership being that of all ownership to the surface and everything permanently situated beneath or above it as described in Title 60, Oklahoma Statutes, Section 66, but less and except all oil and gas mineral rights previously conveyed and severed from his Fee Ownership and the ownership of oil and gas leasehold estates originating therefrom.

2. That prior to April 5, 1973, Transok Pipeline Company, through it's agents and servants made entry upon this land for the express purpose of examining, preparing, and doing those things necessary to complete a proposed gas storage project so that they could thereafter maintain and operate such underground natural gas storage facilities.

3. That the defendant was advised on April 5, 1973, that the fences on his property had been cut, that gates had been left open when they were shut, that bulldozers and work crews were on his land, along with work-over rigs, owned by parties unknown.

4. That on April 7, 1973, the defendant encountered members of a work crew, one of which admitted that he

"Exhibit A"

had been following instructions of Transok Pipeline Company and had participated in the work described in "3" above. That the other worker refused to say who he was with or what he was doing. That the defendant advised them to stay off of his property until they had authority under law to make entry to his property.

5. That on April 10, 1973 Mr. Reddick, an employee of Public Service Company of Oklahoma and Transok Pipeline Company, *called Mr. Les Starks, the party responsible for the care of the cattle on the Darks' property*, and advised him that Transok Pipeline Company was coming back in on the Darks' property.

6. That the defendant then called Mr. Charles B. Crane, attorney for Transok Pipeline Company to discuss the matter. Mr. Crane advised the defendant that there must be some misunderstanding and that Mr. Darks could be assured that Transok Pipeline Company would not make further entry until this matter was discussed with him. Mr. Crane further gave his word that the matter would be handled in this manner.

7. That on April 17, 1973 the defendant was advised that Transok Pipeline Company was back on his property and had again left gates down and allowed the cattle to again be lost south of the ranch.

8. That on May 24, 1973 the defendant again called Mr. Charles B. Crane, attorney for Transok Pipeline Company regarding this matter and he now denied that any entry had been made on the Darks' land other than the possible trespass of a surveying crew.

9. On May 31, 1973 the defendant took this matter up with the Honorable Bob Howell, after he had disqualified in this case but remained in the case to appoint the appraisers and after the Judge advised Mr. Mike

Smith, one of the attorneys for the defendant, that there would be no judge over to hear the motions filed in the case by Mr. Smith, the defendant then stated to the Judge that he needed some one to issue a temporary restraining order in this matter as the Transok Pipeline Company was violating the provisions of Article 2, Section 24 at which time he was advised that he had a remedy at law and the matter would not be heard.

10. That on June 7, 1973 when Honorable Rudolph Hargrave heard the motions filed in this case, Mr. Mike Smith made a request for a temporary injunction and was advised by the court that he had a remedy at law and that this matter would not be heard in this case.

11. That Article 2, Section 24 of the Constitution of Oklahoma specifically states that "Until compensation shall be paid to the owner, or into court for the owner, the property shall not be disturbed, or the proprietary rights of the owner divested."

12. That by reason of the fact that the statutes under which this condemnation are in violation of the due process clause of the United States Constitution and the Oklahoma Constitution; that a temporary injunction should be issued herein preventing the entry on to the property of the defendant until such time as the constitutional question of due process is resolved after the defendant has exhausted his legal rights herein.

13. That the *defendant* has suffered special and peculiar injury from the unlawful trespass upon his land for the following reasons, to-wit:

(a) That by reason of gates being left open the bulls on his commercial cattle gained entry to 44 Santa Gertrudis heifers that were eligible for registry in the Santa Gertrudis Association. That a registered Santa Gertrudis bull with Rock-

fellow Ranch breeding had been purchased to use in the breeding program for the registered heifers but had not been placed with the heifers because of their young age and that as a result of the gates being left down and the fences being cut in the trespass on the defendant's land he has suffered irreparable injury in the breeding program planned for the cattle resulting in great damage to the value of the herd.

(b) That by reason of the fact that the fences were cut and the gates left open the cattle left defendant's property on his south side into a primitive area where they remained several days before they could be located and returned to the property of defendant. That said area contains cattle and bulls of various blood lines and this fact further complicates the breeding program and adds additional damage to the value of the herd.

14. That such disregard for the rights of ownership of the defendant herein has further reduced the market value in and to his property by reason of the fact that no one wants to be subject to this form of rude, overbearing trespassing on the part of an operator.

15. *That defendant has suffered in excess of $10,000 damage to his cattle herd* and other special damage to the land not yet assessable but for which defendant is entitled to actual and punitive damages by reason of this wrongful and intentional conduct on said land reflecting reckless disregard for the rights of defendant in his land.

16. That said nuisance is continuous and constantly recurring, and that it will work irreparable injury to the defendant and his land, and will result in interminable litigation, unless the defendant has relief in law and in

equity and this court has jurisdiction in this matter under the provisions of Article 2, Section 24, and other applicable law to hear and determine this matter.

17. That a duplicate original application for this temporary restraining order has been mailed to the Honorable Rudolph Hargrave, District Judge, Seminole, Oklahoma, along with a proposed order for his signature.

18. That a copy of the application has been mailed to Mr. Charles B. Crane, Attorney, P. O. Box 201, Tulsa, Oklahoma, 74102.

19. That the original verified application has been mailed to Mrs. Lois Merchant, County Clerk, Holdenville, Oklahoma, this date.

By reason of the foregoing, the defendant ask the court to grant a order temporary restraining any further entry onto the land of the defendant herein and further ask that at said hearing a temporary injunction be granted injoining any further entry onto the land of the defendant until the rights of plaintiff and defendant have been adjudicated finally in this matter as to allow entry at this time onto the land of the defendant by the plaintiff could result in irreparable damages to his land and limit his rights to said land prior to a final adjudication in this matter.

/s/ Maxwell Darks

STATE OF OKLAHOMA
COUNTY OF OKLAHOMA

Subscribed and sworn before me, the undersigned Notary Public, on the 9th day of June, 1973.

/s/ Sammy C. Roberts

My commission expires March 10, 1974

IN THE DISTRICT COURT
OF HUGHES COUNTY
STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY,
A Corporation
Plaintiff
-vs-
HUBERT DOUGLAS, JR., et al
Defendant

No. C-73-93

MOTION TO DISMISS WITH PREJUDICE
AND REQUEST TO ISSUE
PERMANENT INJUNCTION

COMES NOW the Defendants, Maxwell Darks, North Central Oil Corporation, B. Broadrick, Mary Enod Williams, Robert M. Moran, Barbara M. Moran, Barbara M. Jernigan, and John E. Moran Trust and respectfully show the court as follows:

I

That the Plaintiff, Transok Pipeline Company, has wholly failed, neglected and refused to comply with its constitutional and statutory duties under the laws of the State of Oklahoma in the prosecution of the above styled action in the following particulars, to-wit:

1. That several months prior to the report of the commissioners in this cause, Plaintiff entered upon the property of Defendant Maxwell Darks and disturbed his possession thereof by rearranging the terrain, cutting cattle fences, *allowing the release of the Defendant Maxwell Darks cattle* and disturbing the proprietary rights of this Defendant by laying injection pipeline and preparing injection wells; all causing irrepairable damage to this Defendant without authority of law.

2. That although Plaintiff is required under the law of the State of Oklahoma to submit to the commissioners information as to the quantity and boundaries of the property being condemned, they wholly failed to do so.

3. That although the commissioners had no knowledge as to the quantity of the property being condemned, they filed their report with the clerk of this court, as to an award of damages for this and other Defendants. That although the said report of the commissioners was filed herein on June 25, 1973, the Plaintiff has wholly failed to deposit the money assessed as damages to those Defendants in such a manner as to allow these Defendants to demand and obtain "immediate receipt" of same. That the damages awarded these Defendants were commingled with the damages of other defendants herein so as to render it impossible for the clerk to pay any individual defendant as shown by Defendant's Exhibits "A" and "B" attached hereto and made a part hereof. That this delivery by Plaintiff to the clerk was calculated to technically comply with the law of the State of Oklahoma but thereby deprive this and other defendants of the availability of these funds.

4. That under the constitution and statutes of the State of Oklahoma, payment of money to these Defendants is a MANDATORY CONDITION PRECEDENT to Plaintiff's right of entry and possession upon Defendants' property. Plaintiff's failure to take the necessary affirmative action as required by law, is, in effect, an abandonment of this lawsuit and places Plaintiff in the position of a mere "naked trespasser."

5. That the form of notice of the report of the commissioner has not been shown to be one approved by the Supreme Court of Oklahoma and having been prepared

by the court administrator as required under Oklahoma law.

II

That one of the commissioners appointed by the court in this cause, to-wit: Binas Hostettler, is an attorney a member of the Oklahoma Bar Association, and is, therefore, not an eligible freeholder selected from the jury list as required by the Oklahoma Constitution to serve as a commissioner in this cause.

WHEREFORE, premises considered, the above named Defendants respectfully request that this Honorable Court dismiss this cause with prejudice as Plaintiff's actions herein have fragrantly [sic] ignored the constitutional and statutory procedure for this action as well as the rights of these Defendants and that this Honorable Court enter an order permanently enjoining the Plaintiff from making further entry or committing further trespass upon the lands of these defendants and for such other relief as the court deems appropriate.

/s/ Carl Michael Smith
Carl Michael Smith
402 Oklahoma Mortgage Building
Oklahoma City, Oklahoma

Attorney for Defendants

CERTIFICATE OF MAILING

I, Carl Michael Smith, do hereby certify that I have mailed a true and correct copy of the above and foregoing Motion to Dismiss with Prejudice and Request to Issue Permanent Injunction to Charles B. Crane, attorney at Law, P. O. box 201, Tulsa, Oklahoma, 74102, on this 20th day of February, 1974.

/s/ Carl Michael Smith
Carl Michael Smith

IN THE DISTRICT COURT
OF HUGHES COUNTY
STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY,
A Corporation
Plaintiff
-vs-
MAXWELL DARKS
Defendant

No. C-73-94

MOTION TO DISMISS WITH PREJUDICE
AND REQUEST TO ISSUE
PERMANENT INJUNCTION

COMES NOW the Defendants, Maxwell Darks, North Central Oil Corporation, B. Broadrick, Mary Enod Williams, Robert M. Moran, Barbara M. Moran, Barbara M. Jernigan, and John E. Moran Trust and respectfully show the court as follows:

I

That the Plaintiff, Transok Pipeline Company, has wholly failed, neglected and refused to comply with its constitutional and statutory duties under the laws of the State of Oklahoma in the prosecution of the above styled action in the following particulars, to-wit:

1. That several months prior to the report of the commissioners in this cause, Plaintiff entered upon the property of Defendant Maxwell Darks and disturbed his possession thereof by rearranging the terrain, cutting cattle fences, *allowing the release of the Defendant Maxwell Darks cattle* and disturbing the proprietary rights of this Defendant by laying injection pipeline and preparing injection wells; all causing irrepairable [sic] damage to this Defendant without authority of law.

2. That although Plaintiff is required under the law

of the State of Oklahoma to submit to the commissioners information as to the quantity and boundaries of the property being condemned, they wholly failed to do so.

3. That although the commissioners had no knowledge as to the quantity of the property being condemned, they filed their report with the clerk of this court, as to an award of damages for this and other Defendants. That although the said report of the commissioners was filed herein on June 25, 1973, the Plaintiff has wholly failed to deposit the money assessed as damages to those Defendants in such a manner as to allow these Defendants to demand and obtain "immediate receipt" of same. That the damages awarded these Defendants were commingled with the damages of other defendants herein so as to render it impossible for the clerk to pay any individual defendant as shown by Defendant's Exhibits "A" and "B" attached hereto and made a part hereof. That this delivery by Plaintiff to the clerk was calculated to technically comply with the law of the State of Oklahoma but thereby deprive this and other defendants of the availability of these funds.

4. That under the constitution and statutes of the State of Oklahoma, payment of money to these Defendants is a MANDATORY CONDITION PRECEDENT to Plaintiff's right of entry and possession upon Defendants' property. Plaintiff's failure to take the necessary affirmative action as required by law, is, in effect, an abandonment of this lawsuit and places Plaintiff in the position of a mere "naked trespasser."

5. That the form of notice of the report of the commissioners has not been shown to be one approved by the Supreme Court of Oklahoma and having been prepared by the court administrator as required under Oklahoma law.

II

That one of the commissioners appointed by the court in this cause, to-wit: Binas Hostettler, is an attorney a member of the Oklahoma Bar Association, and is, therefore, not an eligible freeholder selected from the jury list as required by the Oklahoma Constitution to serve as a commissioner in this cause.

WHEREFORE, premises considered, the above named Defendants respectfully request that this Honorable Court dismiss this cause with prejudice as Plaintiff's actions herein have fragrantly [sic] ignored the constitutional and statutory procedure for this action as well as the rights of these Defendants and that this Honorable Court enter an order permanently enjoining the Plaintiff from making further entry or committing further trespass upon the lands of these defendants and for such other relief as the court deems appropriate.

/s/ Carl Michael Smith
Carl Michael Smith
402 Oklahoma Mortgage Building
Oklahoma City, Oklahoma

Attorney for Defendants

CERTIFICATE OF MAILING

I, Carl Michael Smith, do hereby certify that I have mailed a true and correct copy of the above and foregoing Motion to Dismiss with Prejudice and Request to Issue Permanent Injunction to Charles B. Crane, attorney at Law, P. O. box 201, Tulsa, Oklahoma, 74102, on this 20 day of February, 1974.

/s/ Carl Michael Smith
Carl Michael Smith

IN THE DISTRICT COURT
OF HUGHES COUNTY
STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY,
A Corporation
Plaintiff
-vs-
BURT WININGER, SR., et al
Defendant

No. C-73-95

MOTION TO DISMISS WITH PREJUDICE
AND REQUEST TO ISSUE
PREMANENT INJUNCTION

COMES NOW the Defendants, Maxwell Darks, North Central Oil Corporation, B. Broadrick, Mary Enod Williams, Robert M. Moran, Barbara M. Moran, Barbara M. Jernigan, and John E. Moran Trust and respectfully show the court as follows:

I

That the Plaintiff, Transok Pipeline Company, has wholly failed, neglected and refused to comply with its constitutional and statutory duties under the laws of the State of Oklahoma in the prosecution of the above styled action in the following particulars, to-wit:

1. That several months prior to the report of the commissioners in this cause, Plaintiff entered upon the property of Defendant Maxwell Darks and disturbed his possession thereof by rearranging the terrain, cutting cattle fences, *allowing the release of the Defendant Maxwell Darks cattle* and disturbing the proprietary rights of this Defendant by laying injection pipeline and preparing injection wells; all causing irrepairable [sic] damage to this Defendant without authority of law.

2. That although Plaintiff is required under the law of the State of Oklahoma to submit to the commissioners information as to the quantity and boundaries of the property being condemned, they wholly failed to do so.

3. That although the commissioners had no knowledge as to the quantity of the property being condemned, they filed their report with the clerk of this court, as to an award of damages for this and other Defendants. That although the said report of the commissioners was filed herein on June 25, 1973, the Plaintiff has wholly failed to deposit the money assessed as damages to those Defendants in such a manner as to allow these Defendants to demand and obtain "immediate receipt" of same. That the damages awarded these Defendants were commingled with the damages of other defendants herein so as to render it impossible for the clerk to pay any individual defendant as shown by Defendant's Exhibits "A" and "B" attached hereto and made a part hereof. That this delivery by Plaintiff to the clerk was calculated to technically comply with the law of the State of Oklahoma but thereby deprive this and other defendants of the availability of these funds.

4. That under the constitution and statutes of the State of Oklahoma, payment of money to these Defendants is a MANDATORY CONDITION PRECEDENT to Plaintiff's right of entry and possession upon Defendants' property. Plaintiff's failure to take the necessary affirmative action as required by law, is, in effect, an abandonment of this lawsuit and places Plaintiff in the position of a mere "naked trespasser."

5. That the form of notice of the report of the commissioners has not been shown to be one approved by the Supreme Court of Oklahoma and having been pre-

pared by the court administrator as required under Oklahoma law.

II

That one of the commissioners appointed by the court in this cause, to-wit: Binas Hostettler, is an attorney a member of the Oklahoma Bar Association, and is, therefore, not an eligible freeholder selected from the jury list as required by the Oklahoma Constitution to serve as a commissioner in this cause.

WHEREFORE, premises considered, the above named Defendants respectfully request that this Honorable Court dismiss this cause with prejudice as Plaintiff's actions herein have fragrantly [sic] ignored the constitutional and statutory procedure for this action as well as the rights of these Defendants and that this Honorable Court enter an order permanently enjoining the Plaintiff from making further entry or committing further trespass upon the lands of these defendants and for such other relief as the court deems appropriate.

/s/ Carl Michael Smith
Carl Michael Smith
402 Oklahoma Mortgage Building
Oklahoma City, Oklahoma

Attorney for Defendants

CERTIFICATE OF MAILING

I, Carl Michael Smith, do hereby certify that I have mailed a true and correct copy of the above and foregoing Motion to Dismiss with Prejudice and Request to Issue Permanent Injunction to Charles B. Crane, attorney at Law, P. O. box 201, Tulsa, Oklahoma, 74102, on this 20th day of February, 1974.

/s/ Carl Michael Smith
Carl Michael Smith

IN THE DISTRICT COURT
OF HUGHES COUNTY
STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY,
A Corporation
Plaintiff
-vs-
JOHN R. TURNER, et al
Defendant

No. C-73-100

MOTION TO DISMISS WITH PREJUDICE
AND REQUEST TO ISSUE
PERMANENT INJUNCTION

COMES NOW the Defendants, Maxwell Darks, North Central Oil Corporation, B. Broadrick, Mary Enod Williams, Robert M. Moran, Barbara M. Moran, Barbara M. Jernigan, and John E. Moran Trust and respectfully show the court as follows:

I

That the Plaintiff, Transok Pipeline Company, has wholly failed, neglected and refused to comply with its constitutional and statutory duties under the laws of the State of Oklahoma in the prosecution of the above styled action in the following particulars, to-wit:

1. That several months prior to the report of the commissioners in this cause, Plaintiff entered upon the property of Defendant Maxwell Darks and disturbed his possession thereof by rearranging the terrain, cutting cattle fences, *allowing the release of the Defendant Maxwell Darks cattle* and disturbing the proprietary rights of this Defendant by laying injection pipeline and preparing injection wells; all causing irrepairable [sic] damage to this Defendant without authority of law.

2. That although Plaintiff is required under the law of the State of Oklaoma to submit to the commissioners information as to the quantity and boundaries of the property being condemned, they wholly failed to do so.

3. That although the commissioners had no knowledge as to the quantity of the property being condemned, they filed their report with the clerk of this court, as to an award of damages for this and other Defendants. That although the said report of the commissioners was filed herein on June 25, 1973, the Plaintiff has wholly failed to deposit the money assessed as damages to those Defendants in such a manner as to allow these Defendants to demand and obtain "immediate receipt" of same. That the damages awarded these Defendants were commingled with the damages of other defendants herein so as to render it impossible for the clerk to pay any individual defendant as shown by Defendant's Exhibits "A" and "B" attached hereto and made a part hereof. That this delivery by Plaintiff to the clerk was calculated to technically comply with the law of the State of Oklahoma but thereby deprive this and other defendants of the availability of these funds.

4. That under the constitution and statutes of the State of Oklahoma, payment of money to these Defendants is a MANDATORY CONDITION PRECEDENT to Plaintiff's right of entry and possession upon Defendants' property. Plaintiff's failure to take the necessary affirmative action as required by law, is, in effect, an abandonment of this lawsuit and places Plaintiff in the position of a mere "naked trespasser."

5. That the form of notice of the report of the commissioners has not been shown to be one approved by the Supreme Court of Oklahoma and having been prepared by the court administrator as required under Oklahoma law.

II

That one of the commissioners appointed by the court in this cause, to-wit: Binas Hostettler, is an attorney a member of the Oklahoma Bar Association, and is, therefore, not an eligible freeholder selected from the jury list as required by the Oklahoma Constitution to serve as a commissioner in this cause.

WHEREFORE, premises considered, the above named Defendants respectfully request that this Honorable Court dismiss this cause with prejudice as Plaintiff's actions herein have fragrantly [sic] ignored the constitutional and statutory procedure for this action as well as the rights of these Defendants and that this Honorable Court enter an order permanently enjoining the Plaintiff from making further entry or committing further trespass upon the lands of these defendants and for such other relief as the court deems appropriate.

/s/ Carl Michael Smith
Carl Michael Smith
402 Oklahoma Mortgage Building
Oklahoma City, Oklahoma

Attorney for Defendants

CERTIFICATE OF MAILING

I, Carl Michael Smith, do hereby certify that I have mailed a true and correct copy of the above and foregoing Motion to Dismiss with Prejudice and Request to Issue Permanent Injunction to Charles B. Crane, attorney at Law, P. O. box 201, Tulsa, Oklahoma, 74102, on this 20th day of February, 1974.

/s/ Charles Michael Smith
Charles Michael Smith

FILED
SUPREME COURT
DEC 9 1975
Ross N. Lillard, Jr.
CLERK

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Tuesday, December 9, 1975

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

47,595 Patsy Sue Shaffer Brady, Exec. of Estate of Susie Lavonne Shaffer v. Patsy Sue Shaffer Brady as Exec. of Estate of Richard D. Shaffer, deceased, et al.
Appeal dismissed with prejudice on motion of appellant.

47,917 Ray Eugene Timmerman v. Alice Mae Timmerman.
Appeal dismissed on motion of appellant.

47,935 Phillips Petroleum Co. v. Oklahoma Tax Commission.
Request for oral argument and petition for rehearing denied.

47,936 Kewanee Oil Co. v. Oklahoma Tax Commission.
Request for oral argument and petition for rehearing denied.

48,065 Larry Randall Oldham v. Drummond Board of Education of Independent School Dist. 1-85, et al.
Request for oral argument and petition for rehearing denied.

48,122 In the matter of the adoption of Regina Mae Jones, a minor child.
Certiorari denied.

48,245 First National Bank of Guymon, Okla. et al v. First National Bank and Trust Co. of Oklahoma City.
Appeal dismissed on motion of appellant.

48,705 Anco Oil Company, Inc. v. Mike Damasiewicz.
Appeal dismissed on joint motion of parties.

48,708 Transok Pipe Line Co. v. Frank Seay, Judge.
Oral argument and rehearing denied.

48,709 Transok Pipe Line Co. v. Frank Seay, Judge.
Oral argument and rehearing denied.

48,855 Rexall Realty Corp. v. Meridian Mall, Inc.
Appeal dismissed on motion of appellant.

48,323 Iron Masters, Inc. v. Bill Trindle, Bass Tamer, Inc. et al.
Appellant granted until January 8, 1976 to file brief.

48,383 James D. Swift and Felma J. Swift v. P. W. Hinton, et al.
Appellants granted until January 12, 1976 to file brief. No further extension contemplated.

48,586 First National Bk & Tr. Co. of Okla. City v. Sanco Enterprises, Inc.; Sanco Finance, Inc.; Raymond R. Santilli, et al.
Appellant granted until January 8, 1976 to file brief.

48,650 Debbie S. Hyde v. Vernon D. Hyde.
Appellee granted until December 16, 1975 to file brief.

48,658 In the matter of the Est. of Joeanner Rushing, deceased.
Appellees granted until January 15, 1976 to file brief.

48,713 Bonnie J. Pool etc. Admin. of Estate of Frank R. Pool, Deceased v. Orval C. Motsinger and Bradley Mechanical Contractors, Inc.
Appellants granted until January 8, 1976 to file brief.

48,814 Melco Drilling Co., Inc. et al v. Elmer Roe Clark et al.
Petitioners granted until January 7, 1976 to file brief.

48,857 In the matter of the Estate of John Bishop, Deceased.
Time for completion of record extended to January 8, 1976.

48,927 Simone L. Hunley v. ICS Financial House, Inc.
Appellant granted until January 8, 1976 to file brief.

Ralph G. Johnson
CHIEF JUSTICE

APPENDIX B

(1) U.S. CONST. amend. V, U.S.C.A. Const Amend. V, p. 4.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, or be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(2) U.S. CONST. amend. XIV, §1, U.S.C.A. Const. Amend. XIII-XIV, p. 33.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(3) OKLA. CONST. art. 2 §24, 1 Okl. Stats. 1971 Official Ed., p. 65.

§ 24. Private property — Public use — Character of use a judicial question. — Private property shall not be taken or damaged for public use without just compensa-

tion. Such compensation, irrespective of any benefit from any improvements proposed, shall be ascertained by a board of commissioners of not less than three freeholders, in such manner as may be prescribed by law. The commissioners shall not be appointed by any judge or court without reasonable notice having been served upon all parties in interest. The commissioners shall be selected from the regular jury list of names prepared and made as the Legislature shall provide. Any party aggrieved shall have the right of appeal, without bond, and trial by jury in a court of record. Until the compensation shall be paid to the owner, or into court for the owner, the property shall not be disturbed, or the proprietary rights of the owner divested. When possession is taken of property condemned for any public use, the owner shall be entitled to the immediate receipt of the compensation awarded, without prejudice to the right of either party to prosecute further proceedings for the judicial determination of the sufficiency or insufficiency of such compensation. The fee of land taken by common carriers for right of way, without the consent of the owner, shall remain in such owner subject only to the use for which it is taken. In all cases of condemnation of private property for public or private use, the determination of the character of the use shall be a judicial question.

(4) 28 U.S.C. §1257(3), 28 U.S.C.A. §§1251-1291, p. 144.

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the

Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

(5) 28 U.S.C. §2101, 28 U.S.C.A. §§1961-2240, pp. 85-86.

§ 2101. Supreme Court; time for appeal or certiorari; docketing; stay

(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceedings, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allottted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay. June 25, 1948, c. 646, 62 Stat. 961; May 24, 1949, c. 139, § 106, 63 Stat. 104.

(6) 52 O.S. 1971 §36.4, 2 Okl. Stats. 1971 Official Ed., p. 3073.

§ 36.4 Certificate of commission. — Any natural gas public utility desiring to exercise the right of eminent domain as to any property for use for underground storage of natural gas shall, as a condition precedent to the filing of its petition in the district court, obtain from the commission a certificate setting out findings of said commission (a) that the underground stratum or formation sought to be acquired is suitable for the underground storage of natural gas and that its use for such purposes is in the public interest; (b) the amount of recoverable oil and native gas, if any, remaining therein; provided, that the commission shall issue no such certificate until after public hearing is had on application, pursuant to

notice served in compliance with notice in civil actions in the district court, together with notice published at least once each week for two (2) successive weeks in some newspaper of general circulation in the county or counties where the gas is proposed to be stored, the first publication to be at least ten (10) days prior to the date of the hearing. Laws 1951, p. 135, § 4.

(7) 66 O.S. 1973 §53, OKLA. St. 1975 Supp., p. 773.

§ 53. Taking by eminent domain — Commissioners — Appointment and proceedings — Right to construct road. — If the owner of any real property or interest therein, over which any railroad corporation, incorporated under the laws of this state, may desire to locate its road, shall refuse to grant the right-of-way through and over his premises, the district judge of the county in which said real property may be situated, shall, upon the application or petition of either party, and after ten (10) days' notice to the opposite party, direct the sheriff of said county to summon three (3) disinterested freeholders, to be slected by said judge as commissioners, and who shall not be interested in a like question.

The condemnor shall give notice to a condemnee by personal service or by leaving a copy of the notice at the condemnee's place of residence with some member of his family over fifteen (15) years of age, or by publication in the case of a condemnee who resides out of this state or a resident of this state who has departed herefrom with intent to avoid service of notice, or whose whereabouts or identity the condemnor, or his attorney, upon diligent inquiry is unable to ascertain, or an unknown heir, successor or assign of one in whom some right, title or interest in the property concerned was possessed, by publishing such notice once a week for two (2) consecutive weeks in a newspaper authorized by law to publish legal notice in the county where the petition is filed, the ten-day period to begin with the first pub-

lication. A copy of such notice and a copy of the petition shall be mailed to such opposite party's last-known mailing address within five (5) days of the first publication thereof. The procedure for service by publication as authorized herein shall in all other respects be as provided by law for service by publication in civil actions, except summons need not first be issued.

The commissioners shall be sworn to perform their duties impartially and justly; and they shall inspect said real property and consider the injury which said owner may sustain by reason of the condemnation and they shall assess the damages which said owner will sustain by such appropriation of his land, irrespective of any benefits from any improvements proposed; and they shall forthwith make report in writing to the clerk of the court, setting forth the quantity, boundaries, and value of the property taken, and amount of injury done to the property, either directly or indirectly, which they assess to the owner; which report must be filed and recorded by the clerk. A certified copy of the report may be transmitted to the county clerk of the county where the land lies, to be by him filed and recorded (without further acknowledgement or proof) in the manner and with like force and effect as is provided for the recording of deeds. And if said corporation shall, at any time before it enters upon said real property for the purpose of construction said road, pay to said clerk for the use of said owner the sum so assessed and reported to him as aforesaid, it shall thereby be authorized to construct and maintain its road over and across said premises. Amended by Laws 1973, c. 28, § 1, eff. Jan. 1, 1974.

(8) 66 O.S. 1971 §54, 3 Okl. Stats. 1971 Official Ed., p. 3988.

§ 54. Compensation, accrual of right to. — When possession is taken of property condemned, as provided

herein, the owner shall be entitled to the immediate receipt of the compensation awarded, without prejudice to the right of either party to prosecute further proceedings for the judical determination of the sufficiency or insufficiency of said compensation. R.L.1910, § 1401.

(9) 66 O.S. 1971 §55, 3 Okl. Stats. 1971 Official Ed., p. 3988.

§ 55. Review of commissioners' report — Jury trial — Notice. — (A) The report of the commissioners may be reviewed by the district court, on written exceptions filed by either party, in the clerk's office within thirty (30) days after the filing of such report; and the court shall make such order therein as right and justice may require, either by confirmation, rejection or by ordering a new appraisement on good cause shown; or either party may within sixty (60) days after the filing of such report file with the clerk a written demand for a trial by jury, in which case the amount of damages shall be assessed by a jury, and the trial shall be conducted and judgment entered in the same manner as civil actions in the district court. If the party demanding such trial does not recover a verdict more favorable to him than the assessment of the commissioners, all costs in the district court may be taxed against him.

(B) Within ten (10) days after the report of commissioners is filed, the court clerk shall forward to the attorney of record for the condemnor, the attorney of record for each condemnee, and to all unrepresented condemnees, a copy of the commissioners' report and a notice stating the time limits for filing an exception or demand for jury trial as specified in paragraph (A) of this Section. This notice shall be on a form prepared by the Court Administrator, which shall be approved by the Supreme Court, and shall be distributed to all clerks of the district court by said Court Administrator. If a

party has been served by publication, the clerk shall forward a copy of the report of commissioners and notice of time limits for filing an exception or demand for jury trial to the last known mailing address, if any, and shall cause a copy of the notice of time limits to be published in one (1) issue of a newspaper qualified to publish legal notice, as defined in 25 O.S.Supp.1969, § 106. After issuing the notices provided herein, the court clerk shall endorse on the notice form filed in the case, the date and that a copy of the report together with the notice was mailed to each party or his attorney of record, or the date the notice was published in compliance with the provisions hereof.

(C) The time limits for filing an exception and demand for jury trial, as prescribed in paragraph (A) of this Section, shall be calculated from the date the report of the commissioners is filed in the case. On failure of the court clerk to give notice within the time prescribed in paragraph (B) of this Section, the court, on application of any party, may extend the time for filing an exception to the report or a demand for trial by jury for a period not to exceed (20) days from the date the application is heard. R.L.1910, § 1402; Laws 1961, p. 497, § 1; Laws 1970, c. 322, § 1. Eff. Jan. 1, 1971.

(10) 66 O.S. 1971 §57, 3 Okl. Stats. 1971 Official Ed., p. 3989.

§ 57. Provisions applicable to all corporations and to state — Proceedings by state — Determination of character of use — Assessment of damages when land taken without condemnation. — The provisions of this article[1] with reference to eminent domain shall apply to all corporations having the right to eminent domain, and shall apply to the State of Oklahoma and its various educational, reformatory, penal and eleemosynary institutions, including departments of state having the power to purchase real property for public purposes, and such

institutions and departments shall have the right under this article to acquire fee simple title to the property taken. When the State of Oklahoma through the managing board or commission of the institution or department of state concerned is unable to purchase any real property needed for any such institution or department, condemnation proceedings to take the same and to pay damages therefor may be instituted in the name of the State of Oklahoma by the managing board or commission of the institution or department of state involved; and all such institutions and corporations shall have the right, under the provisions of this article, to acquire right of way over, under, along or across the property or right of way of any other such corporation, not inconsistent with the purposes for which such property was taken or acquired. In all cases of condemnation of property for either public or private use, the determination of the character of the use shall be a judicial question; and the procedure shall be as provided herein: Provided, that in case any corporation or municipality authorized to exercise the right of eminent domain shall have taken and occupied, for purposes for which it might have resorted to condemnation proceedings, as provided in this article, any land, without having purchased or condemned the same, the damage thereby inflicted upon the owner of such land shall be determined in the manner provided in this article for condemnation proceedings. R.L. 1910, § 1404; Laws 1929, c. 24, p. 20, § 1.

(11) U.S. Supreme Court Rule 19(1)(a), 28 U.S.C.A. RULES, 1975 P.P., 14.

Rule 19. Considerations governing review on certiorari

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling

nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

RESPONDENT'S CERTIFICATE OF SERVICE

I, Kenneth W. East, hereby certify that I deposited in the United State Post Office in Tulsa, Oklahoma, three printed copies of this Brief in Opposition, and mailed same, by First Class Air Mail, postage prepaid, on the 2nd day of April, 1976, to each of the following parties at their Post Office addresses:

H. Maxwell Darks, Petitioner
313 S.W. 103rd St.
Oklahoma City, Oklahoma 73139

Maxwell Darks and Les Starks d/b/a Greasy Creek Cattle Company, Petitioner
c/o H. Maxwell Darks
313 S.W. 103rd St.
Oklahoma City, Oklahoma 73139

Thomas S. Kleppe, Secretary of Interior, Respondent
United States Department of Interior
19th and C Street, N.
Washington, D. C. 20240

Solicitor General
Department of Justice
Washington, D. C. 20530

I further certify that all of the parties required to be served in respect to this cause have been served as stated above, and also certify that my appearance in this Court in respect of this cause accompanies the filing of this Brief in Opposition and Certificate of Service.

Kenneth W. East